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9	122	80a '285	844	516	607
s 47a 546	54a '287	83a '518	s 39a 453	151 '206	s 51a 584
71a '38	58a '338	84a '609	s 59a 600	176 '25	157 '659
59a '320	58a '503	161 '446	152 '517	d 173 '248	59a '535
81a '418	129	181 '558	77a '159	580	155 '647
55a '274	s 46a 273	181 '561	160 '498	154 '169	165 '635
57a '212	160 '516	78a '228	158 '402	532	178 '221
12	d 159 '112	d 174 '151	162 '180	s 51a 307	79a '282
s 62a 219	185	d 72a '646	862	156 '17	154 '202
27	s 25a 223	d 72a '647	f 155 '20	155 '239	57a '668
s 52a 175	138	d 74a '438	181 '246	157 '677	64a '142
63a '181	169 '565	76a '423	166 '880	162 '192	616
69a '580	141	60a '646	170 '602	172 '128	175 '157
40	s 51a 641	63a '425	171 '181	56a '888	154 '197
180 '619	82a '647	245	171 '457	75a '242	155 '663
80a '295	81a '216	s 51a 252	p 153 270	77a '190	75a '578
170 '108	169 '1180	253	855	538	79a '590
177 '414	150	168 '473	61a '428	s 47a 431	75a '589
182 '292	s 50a 629	174 '568	169 '565	164 '336	629
170 '100	163 '658	183 '44	168 '436	71a '553	s 50a 508
54a '394	d 58a '670	263	394	546	166 '645
50	d 60a '506	s 49a 626	s 34a 525	s 50a 685	
s 52a 187	55a '423	71a '342	155 '238	162 '660	
59a '425	57a '118	156 '890	165 '582	56a '478	
159 '465	159	74a '454	173 '117	57a '156	
66a '400	s 52a 116	78a '880	179 '85	58a '562	
66a '402	161	278	74a '386	59a '159	
156 '582	s 51a 281	s 49a 590	396	61a '468	
77a '614	67a '131	159 '391	s 51a 440	69a '105	
60	67a '141	158 '28	157 '677	69a '182	
174 '509	68a '133	174 '622	398	70a '68	
158 '490	78a '408	283	157 '470	72a '85	
80	182 '492	s 49a 657	408	73a '188	
165 '614	77a '21	168 '29	s 54a 252	75a '496	
152 '117	78a '63	63a '296	40a '429	77a '58	
154 '163	83a '590	290	51a '111	78a '479	
150 '531	169	s 51a 249	58a '248	81a '147	
167 '341	s 52a 46	151 '621	62a '263	82a '376	
158 '652	59a '678	54a '519	169 '328	83a '568	
165 '152	181	297	62a '593	77a '178	
176 '506	182 '417	165 '624	441	154 '211	
152 '170	158 '593	58a '315	d 178 '824	80a '234	
92	173 '62	76a '597	449	55a '297	
153 '652	192	303	s 47a 444	568	
160 '556	s 51a 543	181 '399	455	171 '263	
161 '96	66a '358	311	176 '878	76a '544	
166 '489	195	s 51a 284	466	84a '576	
168 '159	169 '565	321	s 43a 127	161 '112	
170 '339	74a '411	s 51a 597	59a '125	577	
150 '85	80a '606	179 '80	166 '513	168 '329	
175 '600	178 '637	182 '273	480	580	
97	166 '526	74a '361	s 47a 414	s 49a 282	
s 31a 62	208	80a '681	501	61a '177	
59a '677	s 49a 315	328	s 33a 102	77a '29	
65a '421	212	s 52a 94	p 150 515	173 '685	
68a '259	s 47a 458	63a '235	p 60a 636	75a '84	
75a '179	179 '368	55a '689	502	60a '533	
78a '577	227	59a '678	s 53a 41	588	
88a '157	s 51a 31	69a '189	506	s 49a 590	
67a '360	158 103	70a '679	155 '391	176 '25	
67a '409	159 462	d 68a '292	155 '225	181 '296	
73a '575	170 623	386	174 '214	181 '307	
59a '545	57a 149	s 51a 349	175 '552	181 '610	
109	59a 424	164 '504	176 '326	176 '29	
183 '546	229	165 '118	d 167 '332	p 81a '594	
d 172 '336	s 51a 166	d 174 '463	513		
72a '57	58a '450	78a '678	168 429		
80a '368	239	163 '69	515		
119	s 51a 328	d 175 '434	s 33a 95		
156 '68	178 '635				
158 '388					

ABBREVIATIONS USED.—A, C means two or more cases on page; a, criticized; d, distinguished; e, explained; f, followed; L, limited; m, modified; o, overruled; p, parallel case; q, qualified; s, same case; w, wrong citation or application; small figures indicate the section to which reference applies; \* indicates rule; case is to a point not mentioned in syllabus.



82

28

# REPORTS

OF

## CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

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NORMAN L. FREEMAN,  
REPORTER.

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VOLUME 150.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN MARCH, APRIL,  
MAY AND JUNE, 1894, AND ONE CASE IN WHICH APPLICATION  
FOR REHEARING WAS DENIED JUNE TERM, 1894.

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# JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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DAVID J. BAKER, CHIEF JUSTICE.

JACOB W. WILKIN, CHIEF JUSTICE.\*

ALFRED M. CRAIG,	}	JUSTICES.
SIMEON P. SHOPE,†		
BENJAMIN D. MAGRUDER,		
JESSE J. PHILLIPS,		
JOSEPH M. BAILEY,		
JOSEPH N. CARTER,†		

ATTORNEY GENERAL,  
MAURICE T. MOLONEY.

---

REPORTER,  
NORMAN L. FREEMAN.

---

CLERK IN THE SOUTHERN GRAND DIVISION,  
FRANK W. HAVILL, Mt. Vernon.

CLERK IN THE CENTRAL GRAND DIVISION,  
ETHAN A. SNIVELY, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,  
ALFRED H. TAYLOR, Ottawa.

---

\* Mr. Justice Wilkin became Chief Justice at the June term, 1894.

† At an election held on the fourth day of June, 1894, in the Fourth Judicial District, Joseph N. Carter was elected to succeed Mr. Justice Simeon P. Shope, and was duly commissioned, and qualified, on June 16, 1894.



# TABLE OF CASES

REPORTED IN THIS VOLUME.

A	PAGE.	PAGE.
<b>Albrecht et al. ads. City of East St. Louis</b> ..... 506 <b>Allen et al. v. McFarland et al.</b> 455 <b>American Trust and Savings Bank v. Gueder &amp; Paeschke Manf. Co.</b> ..... 336 <b>Attorney General v. Newberry Library</b> ..... 229		<b>Chicago, City of, ads. Chicago &amp; Alton R. R. Co.</b> ..... 597 <b>Chicago, City of, ads. Leopold et al.</b> ..... 568 <b>Chicago, Milwaukee &amp; St. Paul Ry. Co. v. Walsh</b> ..... 607 <b>Chicago, Peoria &amp; St. Louis Ry. Co. ads. Terre Haute &amp; Indianapolis R. R. Co.</b> ..... 502 <b>Clayton, Village of, v. Brooks.</b> 97 <b>Cleveland, Cincinnati, Chicago &amp; St. Louis Ry. Co. v. Baddeley</b> ..... 328 <b>Coe et al. ads. McCauley et al.</b> 311 <b>Commissioners of Highways et al. ads. Smith</b> ..... 385 <b>Comstock ads. Elson et al.</b> .... 303 <b>Consolidated Coal Co. of St. Louis v. Bruce</b> ..... 449 <b>Consolidated Coal Co. v. Peers</b> 344 <b>Corbett et al. ads. Rawson</b> .... 466
B		
<b>Baddeley ads. Cleveland, Cin. Chicago &amp; St. Louis Ry. Co.</b> 328 <b>Barnes v. Rembarz</b> ..... 192 <b>Barrows v. City of Sycamore</b> .. 588 <b>Beardstown, City of, v. Smith.</b> 169 <b>Bell et al. ads. Helmuth et al.</b> .. 263 <b>Benson v. Hall</b> ..... 60 <b>Berghoefer v. Frazier</b> ..... 577 <b>Bode ads. West Chicago R. R. Co.</b> ..... 396 <b>Brabrook Tailoring Co. et al. ads. Peterson</b> ..... 290 <b>Bromley v. People</b> ..... 297 <b>Brooks ads. Village of Clayton</b> 97 <b>Bruce ads. Consolidated Coal Co. of St. Louis</b> ..... 449 <b>Brushy Mound, Town of, v. McClintock</b> ..... 129		
C		
<b>Carlton v. People</b> ..... 181 <b>Carr et al. ads. McDonald</b> .... 204 <b>Carrollton, Highway Comrs. of Town of, ads. Wright</b> ..... 138 <b>Cary-Lombard Lumber Co. v. Fullenwider</b> ..... 629 <b>Chicago &amp; Alton R. R. Co. v. City of Chicago</b> ..... 597		
		D
		<b>Dale ads. Davis</b> ..... 239 <b>Danville, City of, ads. English</b> 92 <b>Davis v. Dale</b> ..... 239 <b>Dawson et al. v. Vickery</b> ..... 398 <b>Dumond v. Merchants' Nat. Bank</b> ..... 515 <b>Dumond ads. Union Stock Yards Nat. Bank</b> ..... 501 <b>Dwight, Village of, v. Hayes</b> .. 273
		E
		<b>East St. Louis, City of, v. Albrecht et al.</b> ..... 506 <b>East St. Louis Connecting Ry. Co. v. O'Hara</b> ..... 580

	PAGE.		PAGE.
East St. Louis Electric Ry. Co. v. Stout .....	9	<b>J</b>	
East St. Louis, City of, <i>ads.</i> Holt <i>et al.</i> .....	530	Jacksonville, Louisville & St. Louis Ry. Co. v. Louisville & Nashville R. R. Co. ....	480
Elson <i>et al.</i> v. Comstock .....	303	Jacobson v. Gunzburg .....	135
English v. City of Danville .....	92	Jones <i>ads.</i> Morris <i>et al.</i> .....	542
Evanston, City of, <i>ads.</i> Vane ..	616		
		<b>K</b>	
<b>F</b>		Kagey <i>ads.</i> Sands .....	109
Fisher <i>et al.</i> v. Spence <i>et al.</i> ..	253	Kew v. Trainor .....	150
Frazier <i>ads.</i> Berghoefer .....	577	Koch <i>et al.</i> v. Roth .....	212
Fullenwider <i>ads.</i> Cary-Lom- bard Lumber Co. ....	629	Kotter v. People .....	441
<b>G</b>		<b>L</b>	
Gage v. McDermid .....	598	Lake Erie & Western R. R. Co. v. Middlecoff <i>et al.</i> .....	27
Grand Tower and Cape Girar- deau R. R. Co. v. Walton ....	428	Lake Shore & Mich. Southern Ry. Co. v. Hessions .....	546
Greene <i>et al.</i> v. People <i>ex rel.</i> ..	513	Leopold v. City of Chicago ..	568
Gregg <i>ads.</i> Savage, for use, etc. ..	161	Lester v. People .....	408
Griffith <i>et al.</i> <i>ads.</i> Priddy <i>et al.</i> ..	560	Lightner v. City of Peoria ..	80
Grimes v. Hilliary .....	141	Louisville, Evansville & St. L. Consol. R. R. Co. v. Surwald. ..	394
Gueder & Paeschke Manf. Co. <i>ads.</i> American Trust and Savings Bank .....	336	Louisville & Nashville R. R. Co. <i>ads.</i> Jacksonville, Louis- ville & St. Louis Ry. Co. ....	480
Gunzburg <i>ads.</i> Jacobson .....	135	Lynch <i>et al.</i> <i>ads.</i> Herrick .....	283
<b>H</b>		<b>M</b>	
Hall <i>ads.</i> Benson .....	60	Martin <i>et al.</i> v. Comrs. of High- ways of Scotland Township <i>et al.</i> .....	158
Hanson <i>ads.</i> People <i>ex rel.</i> ....	122	McCauley <i>et al.</i> v. Coe <i>et al.</i> ..	311
Harris <i>ads.</i> Provart .....	40	McClintock, Jr. <i>ads.</i> Town of Brushy Mound .....	129
Hayes <i>ads.</i> Village of Dwight. ..	273	McCormick v. South Park Comrs. ....	516
Heinzelman Bros. <i>et al.</i> v. Schrader .....	227	McDermid <i>ads.</i> Gage .....	598
Helbreg v. Schumann .....	12	McDonald v. Carr <i>et al.</i> .....	204
Helmuth <i>et al.</i> v. Bell .....	263	McFarland <i>et al.</i> <i>ads.</i> Allen <i>et al.</i> ..	455
Henderson <i>ads.</i> Vangieson .....	119	Merchants' Nat. Bank <i>ads.</i> Du- mond .....	515
Herrick v. Lynch <i>et al.</i> .....	283	Metropolitan West Side Ele- vated Ry. Co. v. Stickney ..	362
Hessions <i>ads.</i> Lake Shore & Michigan Southern Ry. Co. ....	546	Middlecoff <i>ads.</i> Lake Erie & Western R. R. Co. ....	27
Hilliary <i>ads.</i> Grimes .....	141	Mitchell <i>et al.</i> v. Hindman .....	538
Hindman <i>ads.</i> Mitchell <i>et al.</i> ..	538	Moore v. People .....	405
Holt <i>et al.</i> v. City of East St. Louis .....	530	Morris <i>et al.</i> v. Jones .....	542
<b>I</b>			
Illinois Central R. R. Co. <i>ads.</i> Partlow .....	321		



N	PAGE.	PAGE.	
Newberry Library <i>ads.</i> Attorney-General.....	229	Smith <i>ads.</i> City of Beardstown 169	
Nibbe <i>et al.</i> <i>ads.</i> People <i>ex rel.</i>	269	Smith <i>v.</i> Comrs. of Highways. 385	
North Chicago Street R. R. Co. <i>v.</i> Wrixon.....	532	South Park Comrs. <i>ads.</i> McCormick.....	516
O		Spence <i>et al.</i> <i>ads.</i> Fisher <i>et al.</i>	253
O'Hara <i>ads.</i> East St. Louis Connecting Ry. Co.....	580	Stickney <i>ads.</i> Metropolitan West Side Elevated Ry. Co.	362
Ohio & Mississippi R. R. Co. <i>ads.</i> Savitz.....	208	Stout <i>ads.</i> East St. Louis Electric Ry. Co.....	9
P		Surwald <i>ads.</i> Louisville, Evansville & St. Louis Consolidated R. R. Co.....	394
Pacaud <i>ads.</i> Traders' Ins. Co..	245	Sycamore, City of, <i>ads.</i> Barrows.....	588
Partlow <i>v.</i> Ill. Central R. R. Co.	321	T	
Pearce <i>v.</i> Turner.....	116	Terre Haute & Indianapolis R. R. Co. <i>v.</i> Chicago, Peoria & St. Louis Ry. Co.....	502
Peers <i>et al.</i> <i>ads.</i> Consolidated Coal Co.....	344	Traders' Ins. Co. <i>v.</i> Pacaud <i>et al.</i>	245
People <i>ads.</i> Bromley.....	297	Trainer <i>ads.</i> Kew.....	150
People <i>ads.</i> Carlton.....	181	Turner <i>ads.</i> Pearce.....	116
People <i>ex rel.</i> <i>ads.</i> Greene....	513	U	
People <i>ex rel.</i> <i>v.</i> Hanson.....	122	Union Stock Yards Nat. Bank <i>v.</i> Dumond.....	501
People <i>ads.</i> Kotter.....	441	V	
People <i>ads.</i> Lester.....	408	Vane <i>et al.</i> <i>v.</i> City of Evanston	616
People <i>ads.</i> Moore.....	405	Vangleson <i>v.</i> Henderson.....	119
People <i>ex rel.</i> <i>v.</i> Nibbe <i>et al.</i> ...	269	Venice, Vill. of, <i>ads.</i> Whittaker	195
People <i>ads.</i> Simons.....	66	Vickery <i>ads.</i> Dawson <i>et al.</i> ...	398
Peoria, City of, <i>ads.</i> Lightner	80	W	
Peterson <i>v.</i> Brabrook Tailoring Co. <i>et al.</i> .....	290	Walker <i>v.</i> Ross.....	50
Priddy <i>et al.</i> <i>v.</i> Griffith <i>et al.</i> ...	560	Walsh <i>ads.</i> Chicago, Milwaukee & St. Paul Ry. Co.....	607
Provart <i>v.</i> Harris.....	40	Walton <i>ads.</i> Grand Tower & Cape Girardeau R. R. Co...	428
R		West Chicago R. R. Co. <i>v.</i> Bode	396
Rawson <i>v.</i> Corbett <i>et al.</i> .....	466	Whittaker <i>et al.</i> <i>v.</i> Village of Venice.....	195
Rembarz <i>ads.</i> Barnes.....	192	Wolff <i>ads.</i> The Workingmen's Banking Co. <i>et al.</i> .....	491
Ross <i>ads.</i> Walker.....	50	Workingmen's Banking Co. <i>et al.</i> <i>v.</i> Wolff.....	491
Roth <i>ads.</i> Koch <i>et al.</i> .....	212	Wright <i>v.</i> Highway Comrs....	138
S		Wrixon <i>ads.</i> North Chicago Street R. R. Co.....	532
Sands <i>v.</i> Kagey.....	109		
Savage, for use, etc. <i>v.</i> Gregg.	161		
Savitz <i>v.</i> Ohio & Miss. R. R. Co.	208		
Schrader <i>ads.</i> Heinzelman Bros. <i>et al.</i> .....	227		
Schumann <i>ads.</i> Helbreg.....	12		
Scotland Township, Comrs. of			
Highways of, <i>ads.</i> Martin...	158		
Simons <i>v.</i> People.....	66		



# CASES

## ARGUED AND DETERMINED

### IN THE

# SUPREME COURT OF ILLINOIS.

THE EAST ST. LOUIS ELECTRIC RAILWAY COMPANY

v.

JENNIE STOUT.

*Filed at Mt. Vernon April 2, 1894.*

1. **EXCEPTIONS**—*preserving in the record.* Where no exception is preserved to the ruling of the court in the giving, refusing or modifying of instructions, or in overruling the motion for a new trial, the assignments of error questioning such rulings will not be before this court for consideration.

2. **SAME**—*whether limited to the judgment, or extended to embrace motion for a new trial.* The language of a bill of exceptions was as follows: "But the court overruled the motion" (for new trial) "and rendered judgment in accordance with the finding of the jury, to the rendition of which judgment the defendant then and there excepted:" *Held*, that the exception did not embrace the ruling on the motion for a new trial, but expressly limited the exception to the entry of the final judgment.

3. **NEW TRIAL**—*overruling motion—exceptions.* The statute (sec. 61, chap. 110,) gives the right to assign error upon the decision of the court overruling motion for new trial, only in case the party has excepted to such decision.

150 9  
55a 274  
57a 212

150 9  
59a 320

150 9  
71a 38

150 9  
81a 413

150 9  
194 1 72

150 9  
e107a 95  
107a 1805  
108a 1586

150 9  
213 1271

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Briefs of Counsel. Opinion of the Court.

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WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding.

Messrs. COCKRELL & MOYERS, for the plaintiff in error:

There is no doubt but that the exception was intended to apply to the ruling of the court on the motion for a new trial. *Martin v. Foulke*, 114 Ill. 206; *Graham v. People*, 115 id. 566; *Insurance Co. v. Peck*, 126 id. 494; *Gould v. Howe*, 127 id. 251; *Steffy v. People*, 130 id. 98.

Mr. JESSE M. FREELS, and Mr. A. FLANIGAN, for the defendant in error:

Our Supreme Court has repeatedly held that "a party, to avail himself of an exception to a decision of the circuit court, must take the exception at the time the decision is made, and that the bill of exceptions must affirmatively show that it was taken at that time." *Dickhut v. Durrell*, 11 Ill. 84; *Allen v. Payne*, 45 id. 340; *Winslow v. Newlan*, id. 147; *Deitrich v. Waldron*, 90 id. 115; *Nathan v. Bloomington*, 46 id. 347; *Railroad Co. v. Miller*, 55 id. 448; *Ritchey v. West*, 23 id. 385; *Hake v. Strubel*, 121 id. 326; *Parsons v. Evans*, 17 id. 238; *Swafford v. Dovenor*, 1 Scam. 167; *Pomeroy v. Bank*, 1 Wall. 599; *Railway Co. v. Wolf*, 137 Ill. 361.

Said third and fourth alleged errors are, therefore, no errors under the law in this case, and can not be considered by this court. *Hill v. Ward*, 2 Gilm. 292; *Dickhut v. Durrell*, 11 Ill. 84; *Railroad Co. v. Modglin*, 85 id. 482; *Steffy v. People*, 130 id. 101; *Railroad Co. v. Garish*, 39 id. 371; *Hake v. Strubel*, 121 id. 326; *Parsons v. Evans*, 17 id. 238; *Swafford v. Dovenor*, 1 Scam. 167; *Wright v. Wheeler*, 55 Ill. 528; *Grimes v. Butt*, 65 id. 350; *Trustees v. Misenheimer*, 89 id. 151; *Buckmaster v. Cool*, 12 id. 76.

PER CURIAM: This was an action for personal injury of defendant in error, resulting, upon trial by jury, in a verdict for

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Opinion of the Court.

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defendant in error of \$1000, and judgment accordingly. On appeal to the Appellate Court this judgment was affirmed, and the railway company prosecutes this writ of error.

The assignment of error questioning the rulings of the court on the admission of evidence has been abandoned in argument, and need not be considered.

No exception was preserved to the ruling of the court in the giving, refusing or modifying of instructions, or in overruling the motion for a new trial, and the assignments of error questioning such rulings are not, therefore, before us for consideration. *Martin et al. v. Foulke et al.* 114 Ill. 206; *Graham v. People*, 115 id. 566; *Fireman's Ins. Co. v. Peck*, 126 id. 494; *Gould v. Howe*, 127 id. 251; *Steffy v. People*, 130 id. 98.

A motion for new trial was made and overruled, and it is insisted, with earnestness, that the subsequent exception to the rendition of the judgment should be held to apply. We are unable to agree with counsel that the order overruling a motion for new trial and the subsequent entry of judgment are so intimately connected that an exception to the entry of the latter should be held to apply to the former. Indeed, the bill of exceptions expressly limits the exception to the entry of the judgment. The language is: "But the court overruled the motion" (for new trial) "and rendered judgment in accordance with the finding of the jury, to the rendition of which judgment the defendant then and there excepted." The statute (sec. 61, chap. 110,) gives the right to assign error upon the decision of the court overruling motions for new trial, only in case the party has excepted to such decision. *East St. Louis Electric Railway Co. v. Cauley*, 148 Ill. 490.

No error is pointed out in the rendition of the judgment, and none is apparent, and nothing else having been excepted to at the trial, it follows that the judgment of the Appellate Court must be affirmed.

*Judgment affirmed.*

MATHIAS HELBREG *et al.*

v.

GUSTAV SCHUMANN *et al.**Filed at Mt. Vernon April 2, 1894.*

1. **DEED ABSOLUTE IN FORM**—*shown to be a mortgage—by parol evidence.* The law is well settled that a deed absolute on its face may be shown by parol evidence to have been executed to secure the payment of money, when it will be treated, in equity, as a mortgage.

2. The declarations and statements of the parties made pending the negotiations, and at the time of the final execution of a deed and contract, are admissible to show that the deed was taken as a mortgage or security, and the rule that the terms and conditions of a written contract can not be varied by parol evidence does not apply.

3. A gave a mortgage on a tract of land owned by him, and afterward sold and conveyed to B the north half of the same, and failing to pay the mortgage or the interest thereon, the administrator of the estate of the mortgagee filed a bill to foreclose the mortgage. An arrangement was then made that B should pay the costs, etc., and \$125 of the debt, and assume payment of the balance due the estate, and A was to convey the south half of the tract to B, who was to mortgage the same to the administrators, and the time of payment was extended, which arrangement was executed, and at the same time B gave to A a contract to reconvey on payment of the mortgage debt and the \$125 advanced: *Held*, that the transaction amounted, in equity, to a mortgage from A to B to secure the latter.

4. **SAME—debt secured by the deed.** In such case B was bound to pay A's debt in order to protect his own part of the land, and the debt so assumed, and the payment of the costs of the suit, constituted a debt from A, which might properly be secured by mortgage.

5. **INSANE PERSONS—declaring forfeiture against.** After a person has been adjudged insane, no forfeiture of his contract for a failure on his part to pay certain sums of money, as, an installment of interest and taxes on land, can be declared, except by decree of a court of competent jurisdiction where he is properly represented by a conservator or guardian.

6. **SAME—setting aside a forfeiture.** A declaration of the forfeiture of rights under a contract, after the party affected has been adjudged insane, and the obtaining of possession of the premises to which the contract relates, will be regarded as fraudulent, and will, in a court of equity, be set aside, and the insane person restored to his rights under such contract.

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Statement of the case.

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7. Courts of equity will set aside contracts made with insane persons on the ground of fraud. Such persons being incapable, for the want of capacity, to enter into a valid contract or do any valid act, all persons dealing with them with knowledge of this incapacity are regarded as perpetrating a fraud upon them.

APPEAL from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

This was a bill, in the Superior Court of Cook county, to redeem, brought by Mathias Helbreg and Sophia E. Schumann, as conservators of Julius Schumann, an insane person, against Gustav Schumann, Theodor Guenther, Magdalena Von der Heide, and Thomas J. McGrath, trustee.

In 1881, and prior thereto, Julius Schumann was the owner in fee of a tract of land containing fifty-five acres, in Cook county, situated about two miles south of Blue Island, upon which he resided as a homestead. On June 6 of that year Julius executed a trust deed upon the entire tract to secure his note for \$2000, payable to one Johann Von der Heide, five years after that date, with six per cent interest, payable annually. Subsequently, he sold the north half of the tract to his brother, Gustav, the latter assuming to pay one-half of the incumbrance just mentioned, or \$1000. Gustav discharged his half of the indebtedness, including interest, by July 3, 1882. Julius paid no interest after June, 1882, neither did he ever pay the principal. Johann Von der Heide, the owner of the note, died June 23, 1887. The note passed into the hands of his administrators, Magdalena Von der Heide and Theodor Guenther. Shortly after their appointment as such administrators they demanded payment of the note, and failing to obtain the money, on January 6, 1888, they filed a bill in the Superior Court of Cook county to foreclose the deed of trust, in which Gustav Schumann was joined as a defendant with Julius Schumann.

Prior to January 21, 1888, the administrators of the estate had recovered a judgment, before a justice of the peace,

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Statement of the case.

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against Julius Schumann, for \$40, and on the date last mentioned there was due the administrators from Julius Schumann, on account of the judgment and on account of the indebtedness secured by the trust deed, \$1435. Julius Schumann made an effort to raise the money from several different parties, but failed. Finally, on January 21, 1888, the following arrangement was consummated between him, his brother, Gustav, and the administrators: Julius Schumann and his wife conveyed, by warranty deed, to Gustav Schumann, the fifty-five acre tract of land, for a consideration expressed in the deed of \$1450. Gustav Schumann paid the administrators \$125 cash, and executed and delivered to them his note for \$1310, due in five years, with interest at seven per cent, payable semi-annually, and a trust deed on the fifty-five acre tract to secure payment of the note. At the same time the following agreement was executed by Julius and Gustav Schumann:

"This agreement, made this 21st day of January, A. D. 1888, by and between Julius Schumann and Gustav Schumann, both of the county of Cook, in the State of Illinois, witnesseth:

"Whereas, the said Gustav Schumann is the owner in fee of the north half of the following described property, situated in the county and State aforesaid, to-wit: (here describes the fifty-five acre tract of land,) and the said Julius Schumann is the owner in fee of the south half thereof; and whereas, the said above described property is encumbered by a trust deed, dated the 6th day of June, 1881, executed by the said Julius Schumann to Louis Luchtemeyer, as trustee, to secure the payment of one promissory note of said Julius Schumann, of even date with said trust deed, for the sum of \$2000; and whereas, foreclosure proceedings have been commenced and are now pending in the Superior Court of said county by the legal holders of said note, to foreclose said trust deed; and whereas, there is now due to Theodor Guenther and Magdalena Von der Heide, administrators of the estate of Johann Von der



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Statement of the case.

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Heide, deceased, the legal holders of said note, and under the provisions of said trust deed, as principal, interest, attorney's fees and costs of said foreclosure suit to date, the sum of \$1435, which said sum of money of right should long since have been paid by said Julius Schumann; and whereas, the said Julius Schumann has this day executed and delivered to the said Gustav Schumann a warranty deed conveying the said above described property; and whereas, the said Gustav Schumann has this day caused said trust deed above mentioned to be released, by paying the sum of \$125 in cash, and executing and delivering to said Magdalena Von der Heide and Theodor Guenther his promissory note for the sum of \$1310, secured by trust deed to Thomas J. McGrath, on the whole of the land above described:

"Now, therefore, it has been and is agreed between the parties hereto, that if the said Julius Schumann shall well and truly pay, or cause to be paid, the said note last above mentioned, so made by the said Gustav Schumann, and the interest thereon, from time to time, promptly, when the same becomes due and payable, together with all taxes and assessments laid, levied or assessed on the south half of the above described land, (time being the essence of this agreement,) then the said Gustav Schumann will, as soon as said indebtedness is fully paid and said trust deed released, on payment of the further sum of \$125 to him, together with interest thereon from the date hereof to the time of payment, at the rate of seven per cent per annum, reconvey to said Julius Schumann the south half of the above described property. And it is expressly agreed, that should said Julius Schumann, for any cause, fail to pay the said above mentioned indebtedness secured by said trust deed to said McGrath, together with the interest thereon, or any installment of interest, or the taxes or assessments aforesaid, or any or either of them, promptly, when the same become due and payable, respectively, then this agreement shall be void absolutely, and with-

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Statement of the case.

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out any notice to or demand on said Julius Schumann, and all money paid by said Julius Schumann on account of principal, interest, taxes, assessments or otherwise, shall be forfeited to said Gustav Schumann. The possession of said premises shall be and remain in said Gustav Schumann. In case of the death of said Julius Schumann before said south half of said premises are reconveyed to him, as above agreed, then this agreement, and all provisions therein contained, shall be void, but payments made under this agreement, in such case, shall not be forfeited, but shall be paid to the widow or next of kin of said Julius Schumann by said Gustav Schumann.

"In witness whereof, the said parties have hereunto set their hands and seals, on the day and year first above written.

JULIUS SCHUMANN, [Seal.]

GUSTAV SCHUMANN. [Seal.]"

At the date of the above transaction Julius Schumann was residing on the south half of the fifty-five acre tract, and he continued to occupy the land until July 17, 1889, when he was taken before the county court of Cook county on a complaint that he was insane, and on a trial before a jury he was adjudged insane and placed in the Cook county insane asylum, where he still remains. Schumann's wife continued to reside on the premises until December, 1889, when Gustav Schumann demanded possession of the premises, and threatened to remove her with an officer, and she finally left and Gustav went into possession of the property, which he still retains.

The bill was filed March 18, 1891, and subsequently an amended bill was filed, in which, among other things, it is alleged "that the said warranty deed from orator and his wife to said Gustav Schumann, although appearing on its face to be absolute, was not intended to be such by orator and said Gustav Schumann, but, on the contrary, it was expressly agreed and understood between them, at and before orator signed the same and gave the same to Gustav Schumann, that the same, and the south half of the premises thereby purport-

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Statement of the case.

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ing to be conveyed, were to be held by said Gustav Schumann simply as security for the payment of the said sum of \$125, paid by said Gustav Schumann to said Theodor Guenther and Magdalena Von der Heide, as aforesaid, and interest thereon at the rate of seven per cent per annum, and as security for any taxes levied or assessed against the south half of said fifty-five acre tract, and paid by Gustav Schumann, and to indemnify said Gustav Schumann from loss or damage to him arising from the execution by him of the \$1310 note, secured by the trust deed to McGrath, and the interest thereon, and that upon payment by orator of said \$125, and interest thereon at seven per cent from January 21, 1888, to the date of such payment, and of all such taxes levied or assessed on the south half of said fifty-five acre tract, and all money paid by Gustav Schumann on said \$1310 note, and upon payment of said \$1310 note, or upon said Gustav Schumann being indemnified from all loss because of his execution of said \$1310 note, or the trust deed securing the same, said Gustav Schumann should reconvey to orator the south half of said fifty-five acre tract by an absolute deed of conveyance, in fee simple."

The bill also contains the following: "That orator is ready and willing and offers to pay to Gustav Schumann said \$125, and interest thereon at seven per cent from January 21, 1888, and all the interest paid by Gustav Schumann on said \$1310 note, and all taxes paid by him, and orator offers to pay said \$1310 note, both principal and interest, or in case the legal holder thereof refuses to accept payment thereof, orator offers to pay into this court the whole of the principal and interest due or to become due thereon, and to secure said Gustav Schumann by bond, with security to be approved by this court, against all loss and injury caused by his having signed or executed said \$1310 note, or the trust deed securing the same." It is also alleged in the bill, that at the time of the execution of the deed, prior thereto, and ever since, Julius Schumann was insane.

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Brief for the Appellants.

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Mr. JAMES E. MONROE, for the appellants:

Parol evidence of the facts and circumstances, including the conversations and negotiations between Julius and Gustav Schumann, and admissions by the latter, leading up to the execution of the warranty deed and agreement in writing, is competent to prove that those instruments were intended as a security for money, only, and therefore are a mortgage. *Russell v. Southard*, 12 How. 139; *Tillson v. Moulton*, 23 Ill. 656; *Darst v. Murphy*, 119 id. 343; *Ennor v. Thompson*, 46 id. 215; *Preschbaker v. Feaman*, 32 id. 480.

While it is true that there can not be a mortgage without a debt, to secure which the mortgage is given, it is also true that there need be no express promise or covenant by the mortgagor to pay the debt. The court may imply the promise from the transaction. And where the money advanced by the grantee in an absolute deed was advanced as the result of a treaty or negotiation for a loan by the grantee to the grantor, but by an express agreement the parties gave the transaction the form of a sale and agreement to sell back the property in order to avoid costs or trouble of a foreclosure, the court will hold the transaction to be a lending upon security, especially if the grantor remain in possession as owner. *Flagg v. Mann*, 2 Sumn. 490; *Russell v. Southard*, 12 How. 139.

The overwhelming weight of authority is to the effect that the absence of a personal obligation to repay the money furnishes no conclusive test to determine whether the conveyance is a mortgage, or a sale with the right to repurchase. While the rights of the parties must be mutual and reciprocal, all that is required is, that the mortgagee shall have the right to foreclose whenever the mortgagor has the right to redeem. There need be no right of the mortgagee to recover the money loaned from the mortgagor personally. *Niggeler v. Maurin*, 34 Minn. 118; *Marshall v. Thompson*, 39 id. 138; *Matthews v. Sheehan*, 69 N. Y. 591; *Brown v. Dewey*, 1 Sandf. Ch. 56.

## Brief for the Appellees.

Where an absolute conveyance is made, and at the same time the grantee gives the grantor an agreement to reconvey to him upon the repayment of the consideration for the conveyance, with interest, the two instruments, in themselves, constitute a mortgage, although the grantor does not covenant or agree to pay back the consideration, or the interest thereon. *Preschbaker v. Feaman*, 32 Ill. 484; *Carr v. Rising*, 62 id. 18; *Murphy v. Calley*, 1 Allen, 107; *Woodward v. Pickett*, 8 Gray, 617; *Bailey v. Bailey*, 5 id. 505; *Rich v. Rice*, 4 Pick. 349; 1 Jones on Mortgages, 250.

The warranty deed having been made as a security for money advanced and to be advanced, is a mortgage, and the provisions of the written agreement for a forfeiture of the interest of the grantor in case of default in making payment of the debt, interest and taxes, are void, as clogs upon the exercise of the right of redemption. There is no such thing as an irredeemable mortgage. The maxim, once a mortgage always a mortgage, applies. 1 Jones on Mortgages, sec. 250; *Preschbaker v. Feaman*, 32 Ill. 484.

A contract made by an insane person with a person having knowledge of his insanity, is voidable, on the ground of fraud. 1 Story's Eq. Jur. (10th ed.) secs. 227-229; 2 Pomeroy's Eq. Jur. secs. 946, 947; *Enckings v. Simmons*, 28 Wis. 273.

Messrs. HOFHEIMER, ZEISLER & MACK, for the appellees :

There can be no mortgage without a debt. *Freer v. Lake*, 115 Ill. 662; *Rue v. Dole*, 107 id. 275.

There must be a continuing, valid debt secured by it, which may be enforced in an action at law, or the deed is not a mortgage. *Freer v. Lake*, 115 Ill. 662; *Sutphen v. Cushman*, 35 id. 186; *Fisher v. Green*, 142 id. 80; *Wilson v. McDowell*, 78 id. 514; Pomeroy's Eq. Jur. sec. 1195, note 1.

A deed absolute on its face will be presumed to be what it purports to be,—an absolute conveyance. The party claiming it to be a mortgage must sustain his claim by clear, satisfac-

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Opinion of the Court.

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tory and convincing proof. *Hartnett v. Ball*, 22 Ill. 43; *Hancock v. Harper*, 86 id. 445; *Bartling v. Brasuhn*, 102 id. 441; *Eames v. Harding*, 111 id. 634; *Clark v. Finlon*, 90 id. 245; *Bailey v. Bailey*, 115 id. 551; Pomeroy's Eq. Jur. sec. 1195, note 1.

Insanity, sickness or other incapacity of the insured, will not be accepted as an excuse for not paying, on the appointed day, the premium provided by a life insurance policy. *Klein v. Insurance Co.* 104 U. S. 88; *Wheeler v. Insurance Co.* 82 N. Y. 543; *Thompson v. Insurance Co.* 104 U. S. 252; *Carpenter v. Insurance Co.* 68 Iowa, 453.

Where, through inevitable accident, the performance of a condition imposed by the contract, and not merely by law, becomes subsequently impossible, such accident will not excuse the non-performance. 5 Lawson on Rights and Remedies, p. 4171, sec. 2520, note 6.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The Superior Court referred the cause to the master in chancery to take the evidence, and report his conclusions as to both law and fact. The evidence was taken and a report filed, in which the master, among other things, found that the warranty deed from Julius Schumann to Gustav Schumann, and the agreement providing for a conveyance, constituted a mortgage, and that complainant was entitled to redeem. Numerous exceptions were filed to the report, a part of which was sustained, a part overruled and a portion remained undecided, and a decree was rendered dismissing the bill. It will not, however, in the view we take of the case, be necessary to go over the different exceptions in detail. We will therefore content ourselves with considering the questions presented by the record, which must control the decision of the case.

It is claimed, on the one hand, that the transaction wherein Julius Schumann conveyed the land to Gustav Schumann and executed a contract to reconvey, amounted to a purchase

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Opinion of the Court.

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by Gustav Schumann and a contract to re-sell, while, on the other hand, it is claimed that the transaction was a mortgage. Parol evidence was introduced for the purpose of showing the intention of the parties at the time the arrangement was consummated. The law is well settled, in a case of this character, that resort may be had to parol evidence to establish the intention of the parties. (*Preschbaker v. Feaman*, 32 Ill. 481; *Ennor v. Thompson*, 46 id. 220; *Darst v. Murphy*, 119 id. 343.) The declarations and statements of the parties, made pending the negotiations and at the time of the final execution of the deed and contract, are admissible, and the rule that the terms and conditions of a written contract can not be varied does not apply to such evidence. The law is well settled that a deed absolute on its face may be shown, by parol, to have been executed for the payment of money, when it will be treated, in equity, as a mortgage. *Miller v. Thomas*, 14 Ill. 430.

The warranty deed from Julius Schumann to Gustav Schumann, and the contract for a reconveyance, and the note and trust deed given by Gustav Schumann to the administrators of the estate of Johann Von der Heide to secure \$1310, were all executed at the same date, in pursuance of the same agreement, and they are all a part of the same transaction, and "they must be taken together as constituting one entire arrangement" or contract. When they are all considered together as one contract, in connection with the circumstances under which they were executed, we are inclined to the view that but one construction can be placed on the transaction, and that is, that it was a mortgage. Julius Schumann was indebted to the administrators of the estate of Johann Von der Heide in a certain sum of money. This was secured by a mortgage on his land and the land of Gustav, his brother. A bill was filed to foreclose the mortgage. If a decree should be rendered, Gustav's land was liable to be sold in payment of the debt, and he had no indemnity or security of any character from Julius to make him whole. He was therefore in-

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Opinion of the Court.

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terested to have some arrangement made under which he could be secured. The administrators agreed to extend the time of payment, and take a new note and mortgage on all the land for the debt, the interest to be increased from six to seven per cent, and the costs paid. In order that Gustav might make the mortgage and at the same time be secure, Julius conveyed the land to him, and he executed a note and mortgage for the debt, and then gave Julius a contract to reconvey, providing he paid the mortgage debt, interest and the \$125 advanced by Gustav, from his own funds. This, in brief, was the transaction, and when analyzed it amounts merely to this: that Gustav Schumann assumed the mortgage debt which Julius Schumann owed the administrators, and the latter, in order to secure Gustav, conveyed him his half of the land, under an agreement that the land should be re-conveyed upon payment of the debt, interest and costs. The agreement for a reconveyance contains no provision or recitation that Gustav Schumann has sold the land to Julius Schumann. It merely provides, after reciting the facts under which Gustav Schumann obtained the title, that if Julius Schumann paid as therein provided, then Gustav should reconvey to him.

.George W. Bowman, who filed the bill to foreclose the deed of trust for the administrators of the estate of Johann Von der Heide, deceased, testified that "about ten days after the bill was filed, Gustav Schumann, in company with his brother, Julius Schumann, called at my office in Blue Island. Gustav said they came for the purpose of seeing whether they could not make some arrangement for an extension of the loan and a settlement of the then pending suit. Gustav Schumann informed me at that time that he was going to help his brother out, and that he would advance him sufficient money to make a payment on this indebtedness secured by the trust deed which we were then foreclosing. He desired to know whether I could help them to make a settlement. I told him I could only take full payment of the debt, and advised him to see



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Opinion of the Court.

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the administrators. He said he would, and they left. They returned the same evening, and Gustav informed me that Mr. Guenther had told them that if they paid all the costs in the suit then pending, and the attorney's fees, and made a new note and trust deed covering the entire property, for what was then due, and included in that note a judgment recovered against Julius by the administrators, and increased the interest from six to seven per cent, he would give them an extension of time. He inquired the amount of the costs. He then asked me what kind of security he would be able to get for his money which he was about to advance. I told him that he could obtain a second mortgage on Julius Schumann's share. A few days after that Gustav came to see me again. He then informed me that he was dissatisfied with the arrangement of obtaining a second mortgage on his brother's interest. He said that he doubted very much whether his brother would ever pay that indebtedness, and he did not want to be put to the expense of a foreclosure suit in case his brother made default. Then it was for the first time that we discussed together the question of making an absolute deed from Julius Schumann and his wife to Gustav, and a trust deed back from Gustav to secure the Von der Heide indebtedness, and the giving by Gustav to Julius of a contract to reconvey to him the property, to be deeded by him to Gustav in case Julius made the payments as provided in the trust deed to be given to secure the Von der Heide indebtedness, and also this indebtedness for the money to be advanced by Gustav. The result of that conversation was, that within a short time I drew up the contract (the contract here involved.) A day was set for the execution of the papers. On the day fixed, Gustav Schumann came to the office, I think somewhere about seven o'clock in the evening. He informed me that the parties would be there in a short time. He asked me whether I had the contract drawn up from him to Julius. I told him I had. He told me to be sure to make the provisions in that contract stringent,

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Opinion of the Court.

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because he did not want to have any trouble of a foreclosure suit in case his brother did not pay promptly when he ought to pay." After detailing the fact of the execution of the warranty deed, the contract for a reconveyance, and the new trust deed, the witness further testified: "I never proposed to Gustav Schumann that he should buy any portion of Julius Schumann's land involved in this suit. The question of his buying any portion of the land, or the whole of it, never came up in my presence. The question of a sale of that land to him was never discussed."

This witness was entirely disinterested, and was in a position to know and understand the facts connected with the transaction better than any other person. He was familiar with all that was said and done from the inception of the transaction until its final consummation, resulting in the execution of the papers, and we think much reliance should be placed on his evidence.

From the evidence of this witness, and from the papers that were executed, it seems plain that the transaction was a mortgage. If Julius Schumann sold the land to his brother, no necessity existed for the execution of a contract providing for a reconveyance containing stringent provisions as Gustav insisted should be inserted in the contract. If the evidence of this witness be true, a sale of the property was never mentioned or discussed. Gustav Schumann, in order to protect his own property, which was embraced in the deed of trust to the administrators, concluded to assume the indebtedness, and as security the deed was made to him. When the negotiations first commenced, the understanding was that a second mortgage should be given, but finally finding Julius would not pay promptly, the deed was made to save the trouble and expense of a foreclosure in case there was a default in payment.

But it is said there was no debt to be secured, and there can be no mortgage in the absence of a debt, and in support of this position *Rue v. Dole*, 107 Ill. 275, and *Fisher v. Green*,

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Opinion of the Court.

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142 *id.* 80, and other like cases, are cited. If there was no other evidence in this case but the warranty deed and the contract to reconvey, there might be much force in the position of counsel; but when the other evidence in the record is considered in connection with the deed and contract, a different question is presented. When all the evidence is considered, it can not be said there was no debt to be secured. Gustav Schumann paid the costs on the suit brought by the administrators to foreclose their deed of trust, amounting to \$125, and assumed the payment of the mortgage debt, amounting to \$1310. The deed was made by Julius to Gustav Schumann as security for these two items, and the plain import of all that was done is, that Julius Schumann was to pay those sums, and interest. There was, therefore, a debt, which might properly be secured by mortgage.

It is also insisted that Julius Schumann failed to pay, as required by the contract, and hence a specific performance of the contract can not be decreed. The note for \$1310 which Gustav Schumann executed and delivered to the administrators, was payable five years after date, with interest payable semi-annually. At what time the \$125 should be repaid does not seem to be specified. Julius Schumann failed to pay the interest that became due on July 21, 1888, and January 21, 1889, and also taxes on the land, but no forfeiture of the contract was declared, nor was any attempt made to terminate the contract on account of this failure. On the 18th day of July, 1889, before another installment of interest became due, he was adjudged insane, and his failure to pay interest or taxes after that date would not authorize Gustav Schumann to declare a forfeiture of the contract, unless done by decree of a court of competent jurisdiction, where the insane person was properly represented by conservator or guardian. Courts of equity will set aside contracts made with insane persons, on the ground of fraud. Insane persons being incapable, for the want of capacity, to enter into a valid contract or do any

## Opinion of the Court.

valid act, all persons dealing with them with knowledge of their incapacity are regarded as perpetrating a fraud upon them. 1 Story's Eq. Jur. sec. 227.

In *Encking v. Simmons*, 28 Wis. 273, where a mortgage with power of sale was foreclosed, under the power of sale contained in the mortgage, after the mortgagor had become insane, it was held that the sale should be set aside for fraud. In the opinion it is said: "In equity the proceeding was fraudulent, and the sale will be set aside, whether the mortgagee knew of the mortgagor's insanity or not. This will always be done where it is for the benefit of the person *non compos mentis*, and where injustice will not thereby be done to the other parties to the transaction, or they can be placed *in statu quo*. No injustice will be done here. The plaintiff (the purchaser at the sale) will be entitled to the redemption money so far as that goes, and for the rest he has the bond or covenant of the mortgagor for repayment. The mortgagee will have the full amount of his debt and interest, which is all he can require. The parties may be placed *in statu quo*. In equity this seems to fall within the third kind of fraud enumerated by Lord Hardwicke in *Chesterfield v. Janssen*, 1 Lead. Cas. in Eq. 472, namely, fraud which must be presumed from the circumstances of the parties, and which goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the court of chancery to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance." So here, the attempted forfeiture by demanding and obtaining possession of the premises from the wife of Julius Schumann, after he had been adjudged insane, must be regarded as fraudulent, and we think complainant, on making full payment of all moneys agreed to be paid, and interest and taxes, was entitled to relief, in equity.

The decree will be reversed and the cause remanded.

*Decree reversed.*

## Syllabus.

## THE LAKE ERIE AND WESTERN RAILROAD COMPANY

v.

JONATHAN P. MIDDLECOFF *et al.**Filed at Springfield April 2, 1894.*

1. **NEGLIGENCE—escape of fire from locomotive—ordinance as to speed of train.** In an action against a railway company for an injury caused in a city by the escape of fire from the locomotive, an ordinance limiting the speed of passenger trains within the city to ten miles an hour is properly admissible for the plaintiff, when one count sets out such ordinance, and that by reason of such excessive rate of speed the sparks were thrown from the engine which set fire to the plaintiff's property, especially when there is evidence tending to show that a high rate of speed is more likely to result in the emission of sparks or coals from the engine.

2. **SAME—evidence showing defendant's right to a side-track in street.** If a railway company obtains the right to lay a side-track upon a street by condemnation or by grant from the owner, on the question of the liability of the railway company for the escape of fire from its engine it will be competent for the plaintiff to prove, as a collateral fact, the nature and extent of the defendant's right, or the burdens imposed upon its exercise, without pleading the condemnation or the private grant. And so the plaintiff may introduce the ordinance showing the rights and liabilities of the company.

3. **SAME—when no injury results.** In an action against a railway company for an injury caused by the escape of fire from an engine while passing through a street on a side-track, the court admitted in evidence the ordinance giving the right of way in the street, which ordinance required the company to make and keep in repair a good and sufficient wagon road on each side of its track: *Held*, that as it was not claimed the injury resulted from the failure to keep in repair a wagon road, the admission of the ordinance, if an error, was harmless.

4. **SAME—liability growing out of joint negligence.** Where an injury is the result of the joint operation of the negligence of several parties, either party thus negligent may be made answerable for the entire injury. All who contribute to a tort are liable to the person injured, each for the entire damage, and it can not be apportioned.

5. **SAME—escape of fire from engine passing through a city.** If the negligence of a city in allowing grass and weeds to accumulate in a street upon which a railway line is located, is not of such a character as to render it liable for the destruction of adjacent property by fire

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Syllabus.

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from the railway engines, this will in no degree lessen the liability of the railway company for communicating fire to the grass and weeds, from which it spreads and destroys property.

6. *SAME—proof of unsafe condition of engine.* In an action against a railway company to recover for injury by the escape of fire from an engine, the defendant introduced evidence tending to show that the engine was in good repair and was furnished with a suitable spark arrester; that it had been recently examined and found in good order, and that it was under the control of a competent engineer, and was being carefully operated: *Held*, on rebuttal it was admissible for the plaintiff to show that on the same day the plaintiff's property was burned, several other fires were set from sparks emitted by the same engine, within a few miles of where the first fire was set.

7. *SAME—contributory negligence of plaintiff—failure to keep land free from combustible materials.* In such an action the court instructed, in behalf of the plaintiffs, that it was not negligence on the part of the plaintiffs, as owners of the property in question, that they had used their land or property in the same manner, or permitted it to be and remain in the same condition, in which it would have been used or would have remained had no railroad passed near it: *Held*, that there is no material objection to the instruction.

8. *VARIANCE—as to situation of property burned.* In an action against a railway company to recover for the loss of buildings by fire, one count described the buildings as situate on a certain block, while the proof showed that the building extended some four feet over into the street: *Held*, that such variance did not apply to the other counts, and a recovery might be sustained under them.

9. *SAME—obviated by stipulation.* Where, at the beginning of the trial, it is admitted by both parties that the property injured fronts on a certain street and is situated on a certain block of a city, the parties can not be allowed to insist that the property is situated otherwise than as thus admitted, and thus defeat a recovery for an injury thereto.

10. *RAILROADS—right of way to be kept clear of dry grass, etc.* So much of a public street as is used and occupied by a railway company constitutes a part of its right of way, within the meaning of the statute requiring such companies to keep the right of way free from dead grass, dry weeds and other dangerous, combustible material.

11. The right of way of a railway company over and upon the streets in a city includes all that part of the street held and in actual use by such railway company for its main track, side-track, switches and turn-outs that are in anywise connected with its main track, and used by the railway company for loading and unloading cars or for storing cars. The company is required to keep such right of way clear from dead grass, etc.

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Brief for the Appellant.

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APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Ford county; the Hon. ALFRED SAMPLE, Judge, presiding.

MESSRS. CLOUD & KERR, Mr. A. E. DEMANGE, and Mr. W. E. HACKEDORN, for the appellant:

Appellees' declaration charges that the property destroyed was in block 46, or on their own premises. The proof shows that a portion of it was not. The variance is fatal. *Railroad Co. v. Morgan*, 72 Ill. 155; *Wright v. Railway Co.* 27 Ill. App. 200, and cases cited; *Railroad Co. v. Ward*, 135 Ill. 511; *Railway Co. v. Friedman*, 146 id. 583; *Railroad Co. v. Winslow*, 66 id. 219; *Insurance Co. v. Rubin*, 79 id. 402; *Hackett v. Smelsley*, 77 id. 109; *Machine Co. v. Rosine*, 87 id. 105.

The two ordinances admitted in evidence were incompetent and immaterial. *Railway Co. v. Klauber*, 9 Ill. App. 613; *Palmer v. Marshall*, 60 Ill. 289; *Railroad Co. v. Godfrey*, 71 id. 500.

The city had exclusive dominion over Holmes street. Upon it rested the burden of keeping it in proper condition, which burden was not transferred to the railroad company. It was not appellant's right of way, within the meaning of that section of the statute which requires railroad companies to keep their rights of way free from dead grass, weeds, etc. Appellant had nothing but a mere right of passage over the street. *Railroad Co. v. Quincy*, 92 Ill. 21; *People v. City*, 65 N. Y. 349.

It is the duty of every property owner to exercise ordinary care for the preservation of his property, commensurate with the dangers which surround it. If he fails to exercise such care, and in consequence suffers loss, he is without remedy. *Railway Co. v. Taukersly*, 63 Texas, 57; *Fitch v. Railroad Co.* 65 Mo. 327; *Small v. Railroad Co.* 50 Iowa, 338; *Railway Co. v. Clayburg*, 107 Ill. 644; *Railroad Co. v. Moran*, 30 Ill. App. 635; *Lester v. Railroad Co.* 60 Mo. 265.

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Brief for the Appellees.

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Mr. THOMAS BATES, Messrs. COOK & MOFFETT, and Mr. J. H. MOFFETT, for the appellees :

The question of title can not be raised by appellant. *Shoup v. Shields*, 116 Ill. 488; *McLean v. Farden*, 61 id. 106; *Railroad Co. v. Cobb*, 94 id. 55; *Railroad Co. v. Lewis*, 51 Fed. Rep. 658.

In the last cited case the court say (p. 663): "In such a case possession is *prima facie* evidence of right, and no stranger may disturb that possession without showing some authority of right from the true owner. This applies to the negligent destruction of the property, as well as to its wrongful taking or asportation."

The ordinance granting the right of way on Holmes street, even if incompetent, could not have injured appellant, and in such case the error is harmless. *Railway Co. v. Greiney*, 137 Ill. 628.

All the land held and in actual use by a railroad company for its side-tracks, switches and turn-outs, must be regarded as a part of the right of way of the company. *Railroad Co. v. People*, 98 Ill. 350.

The law of this State makes it the imperative duty of appellant to keep its right of way free and clear of dry grass, dead weeds, or other dangerous, combustible matter, (Starr & Curtis' Stat, chap. 114, sec. 63,) and the failure to do so is negligence *per se*. It is the duty of the court to so instruct. *Railroad Co. v. Goyette*, 133 Ill. 21; *Railroad Co. v. Huggins*, 20 Ill. App. 639; *Railroad Co. v. Lewis*, 51 Fed. Rep. 658; *Railroad Co. v. Voelker*, 129 Ill. 540.

The statutes of the State of Illinois declare: "It shall not, in any case, be considered as negligence on the part of the owner or occupant of the property that he has used the same in the manner, or permitted the same to be used or remain in the condition, it would have been used or remained had no railroad passed through or near property so injured." Rev. Stat. chap. 114, sec. 104.



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Brief for the Appellees.

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There can be no room, under this statute, for exemption from liability on the part of appellant, on the ground of contributory negligence of appellees. *Railroad Co. v. Voelker*, 129 Ill. 540.

It is not contributory negligence on the part of appellees to permit dry grass, etc., on their lands, which would spread fires negligently set by appellant.

The evidence of witnesses who testified to other fires set by the identical engine which is claimed to have set the fire in question, on the same day, is competent, and has been held so by our courts time and again, and we are surprised that counsel made the point that such evidence is not proper. *Railroad Co. v. Kirts*, 29 Ill. App. 175; *Railroad Co. v. Cruzen*, id. 212; *Railroad Co. v. Goyette*, 133 Ill. 21; *Railroad Co. v. Richardson*, 91 U. S. 454; *Railroad Co. v. Lewis*, 51 Fed. Rep. 658.

The fact that fire and sparks escape from a given engine, of itself raises a presumption of defect therein, and authorizes a finding of negligence against the railroad company. *Logan v. Railroad Co.* 43 Mo. App. 61; *Railroad Co. v. Smith*, 42 Ill. App. 527.

The fact fires were set by sparks from a locomotive at a distance that they would or could not be thrown when the spark arrester is in good order and repair, and the engine in good order and repair and properly handled, is so inconsistent with the evidence of railroad men as to the condition of the engine, spark arrester, competency of the engineer, etc., as to raise a question of fact for the jury. *Hagen v. Railroad Co.* 86 Mich. 615.

The fact that the appellant railroad company set fire to appellees' property, makes for appellees a *prima facie* case, and if set upon its right of way in dead grass, dry weeds, etc., and thereby communicated to the property of appellees, then appellant is absolutely liable. *Railway Co. v. Nicewander*, 21 Ill. App. 305; *Railroad Co. v. Goyette*, *supra*; *Railroad Co. v. Campbell*, 86 Ill. 444.

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Opinion of the Court.

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Even in case where the fire originated outside of appellant's right of way, before they can overcome a *prima facie* case made by appellees by showing that the fire which destroyed their property was set by appellant's engine, appellant is required to show affirmatively that its engine, at the time in question, was equipped with the most approved appliances to prevent the escape of fire, and that the same was in good repair, and was properly, carefully and skillfully handled by a competent engineer. *Railroad Co. v. Quaintance*, 58 Ill. 389; *Railroad Co. v. Campbell*, *supra*; *Railway Co. v. Nicewander*, *supra*; *Railroad Co. v. Pennell*, 110 Ill. 435.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was an action on the case, brought by Jonathan Middlecoff and four others, copartners, etc., for their own use and for the use of certain insurance companies, against the Lake Erie and Western Railroad Company, to recover damages for the destruction by a fire caused by sparks emitted from one of the defendant's locomotive engines, of a certain canning factory and the appurtenances and machinery therein. At the trial the jury found the defendant guilty and assessed the plaintiffs' damages at \$8900, and for that sum and costs the plaintiff had judgment. That judgment, on appeal to the Appellate Court, was affirmed, and this appeal is from the judgment of affirmance.

The facts being settled adversely to the defendant by the judgment of the Appellate Court, we must assume that the evidence warranted the jury in finding that the building and property in question were destroyed by a fire caused as alleged; that the sparks or coals from which the fire originated escaped from the engine through the defendant's negligence, either in the construction, equipment, repair or management of its engine, and that the plaintiffs were not guilty of any negligence contributing to the loss. The facts therefore need not be considered or stated, except so far as may be necessary to a

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Opinion of the Court.

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proper understanding of the rulings of the trial court in the admission and exclusion of evidence and in the instructions to the jury of which complaint is made. For the proper elucidation of the questions thus raised, the facts may be briefly stated as follows:

The canning factory in question was situated on the northerly side of Holmes street in the city of Paxton, and was built in the summer of 1888, by the Paxton Canning Company, a corporation, in which the plaintiffs were stockholders and the owners of a majority of the stock. Holmes street is one of the public streets of Paxton, running from the south-east to the north-west, and having a width of about eighty-five feet. The main track of the defendant's railroad runs along the center of the street, and shortly after the erection of the canning factory, a side track was built by the defendant at the instance of the canning company and for its accommodation, diverging from the main-track at a point a few hundred feet easterly of the canning factory, and running thence westerly near the northerly line of the street and terminating a few feet west of the factory. In the construction of this side-track, the canning company did the grading and furnished the ties, but does not seem to have made any claim of ownership of the side-track. At the point where the canning factory stood, the northerly rail of the side-track was eight and one-half feet from the southerly wall of the factory building, and the space between the side-track and main-track was twenty-three feet and four inches. No other tracks were on the street, but the space between the two tracks had not been leveled up or fitted for travel with wagons.

The business of the canning company not having been financially successful, and the corporation having a large indebtedness, all of which had been guaranteed by the stockholders in proportion to the amount of stock held by them respectively, the company, in the early part of 1891, sold and conveyed the factory with its appurtenances to the plaintiffs

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Opinion of the Court.

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at an agreed price, and during the canning season of the year 1891, the business of the factory was carried on by them.

The evidence tends to show that, during the summer of 1891, weeds and grass had been permitted to grow on the street in the space between the two tracks, and also on the side-track, and that on October 28, 1891, the day of the fire, dry weeds, grass and other combustible material was permitted to be and remain, both in the space between the two tracks and on the side-track. A few minutes before two o'clock in the afternoon of the day last mentioned, an engine on the defendant's railroad drawing a passenger train left the station at Paxton going west. The canning factory was within the city of Paxton and near its westerly boundary, and about 2700 feet westerly from the passenger station. The train that day was about two hours late, and was running at about twenty-five miles per hour as it passed the canning factory, and was rapidly increasing its speed. Some ten or fifteen minutes after the train had passed, as the testimony of several of the witnesses tends to show, smoke was seen to arise from the dry grass and weeds on the side-track in front of the factory, and the fire thus set soon after was carried to the factory and destroyed a large part of the property.

The first point made is, that there is a material variance between the plaintiff's declaration and the proofs, in this, that while the declaration alleges that the buildings and property destroyed were situated on block 46 in Mix's addition to Paxton, the evidence shows that the buildings extended some four feet over into the street. To this objection there are two sufficient answers. The declaration contains several counts, and while the first count alleges that the buildings stood on block 46, the other counts contain no such allegation. If then there is a variance between the description of the property in the first count and the proof, such variance does not apply to the other counts, and the recovery may be sustained under those counts. In the next place, at the beginning of

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Opinion of the Court.

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the trial it was admitted by both parties, among other things, "that plaintiffs' property known as the canning establishment fronts upon Holmes street, and is situated on block 46 of Mix's addition to Paxton." After such admission, the defendant can not insist that the property was situated otherwise than as thus admitted.

It follows from the same reasons that the court properly refused to instruct the jury, at the instance of the defendant, that if any part of the buildings destroyed were in Holmes street, then as to such part, the plaintiffs could not recover; or did not err in instructing the jury, at the instance of the plaintiffs, that if they believed from the evidence that some of the buildings destroyed extended into the street, that fact could not of itself prevent the plaintiffs from recovering for the property so on the street, provided they believed from the evidence that the fact of their so extending into the street did not of itself contribute to the setting or spreading of the fire.

It is next insisted that the court erred in admitting in evidence an ordinance of the city of Paxton limiting the speed of passenger trains within the city to ten miles an hour. One count of the declaration set out this ordinance and alleged that by means thereof the sparks were thrown from the engine which set fire to the plaintiffs' property. We are able to see no good reason why this ordinance should not have been admitted, especially in view of the evidence tending to show that a high rate of speed was more likely to result in the emission of sparks or coals from the engine.

The plaintiffs' counsel also offered in evidence the ordinance of the city of Paxton granting to a railway company, of which the defendant is the successor, the right to lay its track in Holmes street, and imposing upon it certain burdens in relation to keeping the street in repair, etc. This ordinance was objected to on the ground that it was not set up or pleaded by the plaintiffs in their declaration. This objection was overruled, and the ordinance was permitted to be read to

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Opinion of the Court.

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the jury, but the plaintiffs, before their evidence was closed, voluntarily withdrew it, and the jury were instructed by the court to disregard it. It was not necessary, in our opinion, that this ordinance should be pleaded in order to make it admissible in evidence for the purpose for which it was offered. No right of recovery was sought to be based upon it, but it was merely introduced as collateral proof, tending to show by what right the defendant had constructed and then maintained its railway tracks in the street, and its duty in respect to restoring the street to its former condition, and thereafter keeping it in repair. If the defendant's right of way had been obtained by condemnation, or by grant from the owner, it would not have been contended, we think, that to make it competent for the plaintiffs to prove, as a collateral fact, the nature and extent of the defendant's right, or the burdens imposed upon its exercise, it would have been necessary to plead the condemnation proceedings or the private grant. And we are unable to see that the rule should be different where the defendant's title happens to be derived from a municipal corporation, or to have been granted by ordinance.

But it is urged that the ordinance was immaterial, and that its admission, when taken in connection with the evidence tending to show a failure on the part of the defendant to perform the duties which it imposed, had a tendency to prejudice the jury against the defendant. It is true, by the terms of the ordinance, the defendant was required to restore the street to as good a condition of repair as possible after the construction of its railway, and to make and keep in repair a good and sufficient wagon road on each side of its track, and the evidence tends to show that the duties thus imposed had not been performed, but that the street between the defendant's main-track and its side-track in the vicinity of the canning factory, had been left rough, and not susceptible of being travelled with wagons. But as it is not claimed that the loss of the plaintiffs' property by fire resulted in any way,

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Opinion of the Court.

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either directly or indirectly, from the defendant's failure of duty in those respects, and as there is no evidence tending to sustain that conclusion, we are unable to see that any material injury could have resulted to the defendant from the admission of the ordinance.

It is urged in the next place that the court erred in admitting evidence tending to show that dry grass, weeds and other combustible material had been permitted to accumulate and remain in the street in the space between the main-track and the side-track, and also on the side-track. The contention is, that the street, outside of that portion of it actually occupied by the two railway tracks, constituted no part of the defendant's right of way, within the meaning of that section of the statute which makes it the duty of all railroad companies to keep their right of way clear from all dead grass, dry weeds or other dangerous combustible materials. 2 Starr & Cur. 1933. It is accordingly argued that the burden of caring for Holmes street in this respect, and of keeping it free from dry grass, weeds and other combustibles was upon the city of Paxton and not upon the defendant. Admitting this contention so far as it applies to all portions of the street except those actually occupied by the defendant's railway tracks, and the conclusion sought to be reached, in our opinion, does not follow.

If it be admitted that the negligence in allowing dry grass and weeds to remain in the street was that of the city, and that such negligence contributed to the loss by fire of the plaintiffs' property, a case is presented where the negligence of a third party has concurred with that of the defendant in producing the injury complained of. Where an injury is the result of the joint operation of the negligence of several parties, either party thus negligent may be made answerable for the entire injury. All who contribute to a tort are liable to the person injured, each for the entire damage and it can not be apportioned. Bishop's Non-Contract Law, sec. 522.

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Opinion of the Court.

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But even if it should be admitted that the negligence of the city was not of such character as to render the city liable for the destruction of adjacent property by fire, we are unable to see that the responsibility of the defendant would be in any degree lessened or modified. The case would then be like any other where combustible material is allowed to accumulate and remain on the premises of a third person adjoining the right of way of a railway company, and sparks negligently emitted from its engine sets a fire which spreads and is communicated to other property more distant.

But there is another reason why the evidence of dry grass and weeds remaining in the space between the two tracks could not have resulted in any injury to the defendant, even if it should be admitted that such evidence was immaterial. It was not contended at the trial nor is it now, that the fire started in the grass and weeds between the two tracks, or that the combustible material there situate contributed in the slightest degree to the fire. The plaintiffs' counsel insist that, according to the great preponderance of the testimony, the fire originated on the side-track, and spread from that point to the canning factory, while counsel for the defendant insist that, as shown by the preponderance of the testimony, it started in a pile of husks lying wholly outside of the street and upon the plaintiffs' premises. It not being pretended therefore that the combustible material in the street, other than that on the defendant's side-track, contributed in the least to the fire, the evidence of the existence of such material could manifestly have had no influence with the jury.

We are of the opinion that so much of the street as was actually used and occupied by the defendant for railroad purposes constituted a part of its right of way, within the meaning of the statute above referred to, and that it was required to keep so much of the street free from dead grass, dry weeds and other dangerous combustible material, the same as the other parts of its right of way. And this seems to have been



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Opinion of the Court.

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the view taken by the trial court, and laid down in the instructions to the jury. Thus, in the first instruction given at the instance of the plaintiffs it was held that, the right of way of a railroad company over and upon the street in a city includes all that part of the street held and in actual use by such railroad company for its main-track, side-tracks, switches and turn-outs, that is in anywise connected with its main track, and used by such railroad company for loading and unloading cars, or for storing cars; and by the third instruction it was held that it was the duty of all railroad corporations to keep their right of way clear from dead grass, dry weeds and other dangerous combustible material. These instructions, in our opinion, laid down the rule applicable to the case correctly, and in view of such instructions, as well as for the reasons already given, the jury could not have been prejudiced by the evidence of dry grass, etc., in the street.

Complaint is made of the admission of the testimony of several witnesses tending to show that on the same day on which the plaintiffs' property was burned, several other fires were set from sparks emitted by the same locomotive engine within a few miles of Paxton. We think this evidence was proper. The defendant had introduced evidence tending to show that the engine was in good repair, that it was furnished with a suitable spark arrester, that it had been recently examined and found in good order, and that it was under the control of a competent engineer, and was being carefully operated. That the evidence above mentioned had a tendency to rebut the case thus made seems to us to be very clear. It tended to show that, notwithstanding the testimony of the defendant's witnesses, there must have been something wrong with the construction, repair or management of the engine. The fact that on the same trip it was scattering fire all along the way, gives some occasion for the conclusion that the testimony of the defendant's witnesses could not have been true.

## Syllabus.

An instruction was given for the plaintiffs which held, as a matter of law, that it was not negligence on the part of the plaintiffs, as owners of the property in question, that they used their land or property in the same manner, or permitted it to be and remain in the same condition, in which it would have been used, or would have remained, had no railroad passed near it. This instruction was, in substance, in the terms of the statute, and we are unable to see any material objection to it.

Many other objections are made to the rulings of the court, both in relation to the admission of evidence and in the instructions to the jury. To notice them all in detail would extend this opinion to an unwarranted length. All we need say is, that we have carefully considered them all in the light of the arguments submitted by counsel, and are of the opinion that none of them have any substantial merit. Some of the rulings of the court may have been subject to some degree of criticism, but when viewed in the light of all the facts as they appeared at the trial, we do not think that any error was committed so prejudicial to the defendant in its effects, as to require or justify a reversal of the judgment and a re-trial of the case. The judgment of the Appellate Court will accordingly be affirmed.

*Judgment affirmed.*

JOSIAH W. PROVART *et al.*

v.

EMILY HARRIS *et al.*

*Filed at Mt. Vernon April 2, 1894.*

1. DEED—*delivery essential.* Delivery is indispensable to the validity and operation of a deed. That is the final act on the part of the grantor by which he consummates the purpose of his conveyance, and without it all other formalities which have preceded are impotent to render it effectual as an instrument of title.

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80a	296
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187	348
187	1850
150	40
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197	57
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211	

## Syllabus.

2. **SAME—delivery—how made.** The law prescribes no formulary to be pursued in making delivery of a deed, and it may be done "by acts without words, or by words without acts, or by both." It may be "either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be by both; but it must be made by one or both these ways, for otherwise, though it be never so well sealed and written, it will be of no force."

3. **SAME—delivery without actual possession of grantee.** While it may not be essential, in all cases, that the deed shall be delivered into the actual possession of the grantee, it is indispensable that the deed shall pass beyond the dominion and control of the grantor. Until the grantor parts with all control over his deed, that of his grantee does not attach. If the grantor retains control over his deed, it will be ineffectual, for any purpose, as a conveyance.

4. It is absolutely essential that the acts done or words spoken, or both, shall clearly manifest an intention on the part of the grantor that the deed shall presently become operative to convey the estate therein described, to the grantee, and that he has parted with all dominion and control over it.

5. So long as a deed is in the hands of a depository, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with the control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it.

6. A party, in his last illness, being desirous of disposing of his property, had a scrivener called in, whom he directed to draw five deeds to five of his sons, and his will. After the making of the deeds the scrivener commenced to write the will, but the grantor being too weary to proceed, he requested the scrivener to call the next morning. The scrivener, as he was leaving, asked the grantor if he should take with him the deeds, who said, "No, let them stay where they are." He said to his pastor, on the day the deeds were drawn, that he wanted to make the deeds for his boys, and that if he did not get better he wanted the pastor to take the deeds and have them recorded. The grantor died before the next morning, leaving the deeds on the table where they were placed by the draftsman: *Held*, that there was no delivery of the deeds to the grantees therein named.

7. **PRACTICE IN THE SUPREME COURT—cross-errors.** Where a defendant in error, or an appellee, does not assign cross-errors, he can not question the correctness of the ruling of the trial court in allowing the appellant to testify in a chancery case.

8. **SAME—when competency of evidence becomes immaterial.** This court will not determine the competency of evidence which was not considered by the chancellor, when it can not change the result if treated as proper evidence.

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Statement of the case.

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APPEAL from the Circuit Court of Perry county; the Hon. B. R. BURROUGHS, Judge, presiding.

This was a bill in chancery, in the circuit court of Perry county, brought by appellees, as heirs-at-law of Philip C. C. Provart deceased, against the widow and other co-heirs-at-law, and their respective husbands and wives, to set aside and have annulled certain deeds purporting to convey to five of his sons, in severalty, certain lands in said deeds described, to have said lands declared a part of decedent's estate, the dower and homestead of the widow therein set off and assigned, and the lands partitioned among the heirs, etc. Answers were filed by the guardians *ad litem* of the minor defendants, neither admitting nor denying the allegations of the bill, but setting up the interests of the minors, and invoking the protection of the court in that behalf, etc. The adult defendants, appellants Josiah W., Zepheniah R., Hosea P., Azariah and Edgar Provart, the said five sons, filed their joint and several answers, setting up claim to said lands under and by virtue of said deeds. The other defendants did not answer, and were defaulted. Hearing was had on bill, answer, cross-bill of minors, replication and proofs, and a decree entered in accordance with the prayer of the original bill, from which decree appellants prosecute this appeal.

On July 3, 1890, Philip C. C. Provart, *causa mortis*, undertook the disposition of his estate among his heirs, etc. At his instance a justice of the peace, John Harris, was called in, who drew five deeds, one to each of said five sons, appellants, which deeds were duly signed and acknowledged by the said Provart and wife. The justice was then further requested to proceed with the drafting of a will, which was at once entered upon, the commencement written, but said Provart becoming exhausted, deferred the matter until the next morning, and requested the justice to then call and complete it. Before leaving, the said justice asked him if he desired that he (the

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Statement of the case.

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justice) should take the deeds, which had been laid on a table in the adjoining room, along with him and retain them till morning, to which Provart replied, "No, leave them where they are; they have been cared for." The justice immediately departed, and in less than an hour thereafter Provart died. Provart had asked Rev. Josiah Harris, who was present, that if he (Provart) did not get along, or well, to take the deeds and have them recorded. The Rev. Harris, on July 4, after Provart's death, took the deeds and delivered them to two of the sons not grantees therein, who on the same day delivered to each of the grantees therein his deed, respectively. No further act toward the disposition of his estate was done by said Provart.

On the hearing, appellants, over objection of complainants in the bill, were permitted to testify in their own behalf, and it is assigned for error that the court refused to consider this testimony in the rendition of its decree. No cross-errors are assigned.

By the decree entered December 16, 1890, the court found as to said several deeds to appellants, that "no actual delivery of the same was made, neither to the said several grantees nor to any person in their behalf, but that on the next day, after the decease of the said Provart, the same were, by the hand of one Josiah Harris, delivered to strangers to the transaction, members of the family of the said Philip C. C. Provart, and were finally permitted to come into the hands of the said grantees, who caused the same to be filed and entered of record as aforesaid, and that there was no actual or constructive delivery of the said deeds, or either of them, by the said Provart, in his lifetime, to the said grantees, or to either of them, nor to any person in their, or either of their, behalf;" decreed each of said deeds null and void, and set the same aside; finds advancements made, in decedent's lifetime, to certain of his children, and decrees that such children bring the amounts thereof, respectively, into hotchpot, etc., or be

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Brief for the Appellants.

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barred, etc.; decrees assignment of dower and homestead to the widow, and then partition of the estate according to the respective interests, as prayed in the bill, etc.

Messrs. F. M. & D. V. YOUNGBLOOD, for the appellants:

The rule of law is universal, that where a well executed deed is found in the possession of the grantee, it is presumed to have been delivered and accepted, and parties attacking the validity of such a deed must overcome this presumption by evidence that shows there was no delivery or acceptance. *Hulick v. Scovil*, 4 Gilm. 159; *Bryan v. Wash*, 2 id. 564; *Ferguson v. Miles*, 3 id. 363; *Wiggins v. Lusk*, 12 Ill. 132; *Himes v. Keighlingher*, 14 id. 471; *Warren v. Jacksonville*, 15 id. 236; *Masterson v. Cheek*, 23 id. 72.

The facts in the case at bar show that these conveyances were made as voluntary settlements by the grantor upon the grantees; hence the law makes stronger presumptions in favor of the delivery of the deeds than in ordinary cases of bargain and sale. *Bryan v. Wash*, *supra*; *Masterson v. Cheek*, *supra*.

In cases of voluntary settlement by a father upon the son, the decisions are uniform that the possession of the deed by the grantor until his death did not invalidate or defeat it. *Reed v. Douthit*, 62 Ill. 348, and cases there cited.

Where a grantor places the deed in the hands of a stranger, for the grantee, and no restrictions are imposed upon its delivery, such an act is sufficient to give the deed full effect. *Rawson v. Fox*, 65 Ill. 200.

Even if the deeds had been lost while in the hands of Josiah Harris, the title would have vested in the grantees. *Hinrichsen v. Hodgen*, 67 Ill. 179; *Byars v. Spencer*, 101 id. 429.

No particular form is necessary to constitute a delivery of a deed. The very essence of the delivery is the intention of the party. *Gunnell v. Cockerill*, 79 Ill. 79; 84 id. 319.

On the question of delivery see, also, *Shackelton v. Sebree*, 86 Ill. 616; *Grand Tower Mining Co. v. Cady*, 96 id. 430;

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Brief for the Appellees.

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*Otis v. Spencer*, 102 id. 622; *Weber v. Christen*, 121 id. 91; *Cline v. Jones*, 111 id. 563; *Young v. Young*, 113 id. 430; *Hill v. Hill*, 119 id. 242; *Roane v. Baker*, 120 id. 308.

Mr. W. K. MURPHY, and Mr. THOMAS J. LAYMAN, for the appellees:

We insist that there was no delivery of any of said deeds, or any acceptance of any of them. The rule of law is well settled, that to render a deed valid there must be both a delivery and acceptance during the lifetime of the grantor. *Herbert v. Herbert*, Breese, 354; *Wiggins v. Lusk*, 12 Ill. 132; *Rivard v. Walker*, 39 id. 413.

In this case there is no evidence of any delivery by the deceased of any of said deeds, or that the grantees, or any of them, accepted the deeds, or any of them, during the lifetime of the deceased. Delivery after the death of the grantor is not operative. *Wiggins v. Lusk*, *supra*, and authorities cited.

This court, in *Byars v. Spencer*, 101 Ill. 429, announced the rule that there can be no valid delivery unless the evidence shows that the grantor has parted with all authority and control over the deed.

There is not one word of evidence even tending to show that any person, at any time prior to the death of the deceased, made any inquiry of any of the grantees in said deeds as to what should be done with them. But the evidence certainly does show, beyond all question, that the last words ever uttered by the deceased were to show that he had not delivered any of said deeds to any of said grantees, and that he did not intend to deliver any of them until the next morning.

The rule announced in the following cases has a direct bearing on this case, viz.: *Kingsbury v. Burnside*, 58 Ill. 310; *Insurance Co. v. Campbell*, 95 id. 267, and authorities cited; *Weber v. Christen*, 121 id. 91, and authorities cited; *Price v. Hudson*, 125 id. 284, and authorities cited.

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Opinion of the Court.

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Mr. JUSTICE SHOPE delivered the opinion of the Court :

The important question presented upon this record is, whether the several deeds, signed, sealed and acknowledged by Philip C. C. Provart and wife, were in fact delivered, so as to make them effectual to convey the lands therein described, to appellants. Delivery of the deeds is denied, but as to the facts and circumstances of and attending the alleged delivery there is practically no controversy. The deeds were all signed and acknowledged by the grantor at the same time. On the day of his death, at his request, a scrivener was called in, whom he directed to draw the five deeds and his will. The deeds were drawn, signed and acknowledged, and laid upon a table in an adjoining room, where they were found after the grantor's death. After the making of the deeds was completed, the scrivener entered at once upon writing the will, and having written the commencement, and made memorandum of two items of lands to be devised, the said Provart became too weary to proceed, and requested the scrivener to call the next morning and finish it. The scrivener, being about to take his departure, asked Provart if he should take the deeds along and keep them till morning. The grantor replied, "No, let them stay where they are." A grandson, who was present at the time, testifies that the reply was, "No, they are all right; just leave them alone." Within an hour after the scrivener's departure the grantor died. The pastor, who was also present, testifies: "I laid them" (the deeds) "on the table, together, where they remained until he died. He said two or three times during the day: 'I want to make the deeds out to my boys; if I don't get along I want you to take the deeds and have them recorded; if I get along I will do that myself.' After he died I took the deeds, \* \* \* and next morning gave them to two of the boys,—not the ones the deeds were made to. \* \* \* He did not say what to do with them,—only said to bring them and have them recorded, if he did not



## Opinion of the Court.

get along." The deeds were subsequently handed to appellants and filed for record.

It is apparent from this record that the original design and intention of the father was, at the time, the distribution of his entire estate among those having claim upon his bounty, and that the making of the deeds to his five sons, the appellants, was, in the father's contemplation, but a part of the general plan for the final disposition of his property. It is a familiar and fundamental rule of law; that in order for a deed to operate as an effectual transfer of title to land, it is indispensable that it be delivered. Delivery is the final act on the part of the grantor by which he consummates the purpose of his conveyance, and without it all other formalities which have preceded are impotent to render it effectual as an instrument of title. The law prescribes no formulary to be pursued in making delivery of the deed, and it may be done "by acts without words, or by words without acts, or by both." (*Bryan v. Wash*, 2 Gilm. 565.) Or, as said in *Herbert v. Herbert*, Beecher's Breese, 354, quoting from *Jackson v. Phipps*, 12 Johns. 419, it may be "either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be by both; but by one or both of these it must be made, for otherwise, though it be never so well sealed and written, yet is the deed of no force,"—citing 1 Shepard's Touchstone, 57, 58; 2 Blackstone's Com. 307; Viner's Abr. 27, sec. 52. See, also, *Walker v. Walker*, 42 Ill. 311; *Skinner v. Baker*, 79 id. 496; *Byars v. Spencer*, 101 id. 429.

While it may not be essential, in all cases, that the deed should be delivered into the actual possession of the grantee, (*Gunnell v. Cockerill*, 79 Ill. 79,) it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed pass beyond the dominion and control of the grantor, for, otherwise, it can not be correctly said to come within the power and control of the grantee. Their interests are diametrically opposed. Both can not, consistently with its objects,

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 Opinion of the Court.
 

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have control of the deed at the same time, and until the grantor parts with all control over it, that of the grantee does not attach. (Cases *supra*.) It is absolutely essential that the acts done or words spoken, or both, shall clearly manifest an intention, on his part, that the deed shall presently become operative to convey the estate therein described, to the grantee, and that he has parted with all power of control and dominion over it, (*Bryan v. Wash, supra*.) for, as we have seen, if the grantor retains dominion and control over it, the deed is ineffectual for any purpose as a conveyance. In *Cook v. Brown*, 34 N. H. 460, the court, in passing upon this point, there said: "To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing. It is merely ambulatory, and gives no title. \* \* \* So long as it is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it." In *Prutsmann v. Baker*, 30 Wis. 644, it was said: "To constitute delivery, good for any purpose, the grantor must divest himself of all power and dominion over the deed. \* \* \* An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is, that there must be a parting with the possession, and of the power and control over the deed, by the grantor, for the benefit of the grantee, at the time of delivery." While the doctrine announced in these cases has not been universally adopted, (1 Devlin on Deeds, sec. 283,) it is supported by the great current of authority. See *Hawes v. Pike*, 105 Mass. 560; *Shurtleff v. Francis*, 118 id. 154; *Garnaus v. Knight*, 5 B. & C. 671; *Stilwell v. Hubbard*, 20 Wend. 44; *Brown v. Brown*, 66 Me. 316; *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Baldwin v. Maulsby*, 5 Ired. 505;

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Opinion of the Court.

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*Younge v. Guilbeau*, 3 Wall. 636; *Tompkins v. Wheeler*, 16 Pet. 106, and *supra*.

In *Weber v. Christen*, 121 Ill. 91, it was said, that "if, from all the circumstances, \* \* \* it appears the grantor \* \* \* intended to give effect and operation to the deed, and to relinquish all power and control over it, we think it clear the law would give the deed effect accordingly," etc. In support of this view see, also, *Wiggins v. Lusk*, 12 Ill. 132; *Rivard v. Walker*, 39 id. 413; *Price v. Hudson*, 125 id. 284; *Kingsbury v. Burnside*, 58 id. 310.

Applying the foregoing principles to the case at bar, we think it manifest that there was no delivery of the deeds by the grantor with the intention that they should presently become operative. They were not delivered to the Rev. Harris for delivery to the grantees, but at most they were left where the scrivener had placed them, and Harris instructed by the grantor that in the event he (the grantor) did not get along, to see that the same were recorded, accompanied with the statement that if he did, he would attend to it himself. Undoubtedly his intention was to proceed, on the following morning, with the completion of his will, and effect thereby complete disposition of his estate. Had he been impressed with the conviction that he would probably not live to do so, it might be presumed that he would have made actual delivery of the deeds. But it can not be known that he would ever have delivered them except as part of the general disposition of his property, of which they formed a part. There can be no question that his dominion and control over the deeds, at the time of his death, was such that, had he lived, he could have retracted or destroyed them, and there was therefore no legal delivery of the deeds to appellants.

Appellants were permitted to testify in their own behalf, over the objection of appellees. No cross-error is assigned questioning the correctness of this ruling, and it is not, therefore, presented for decision. It is, however, insisted by appel-

## Syllabus.

lants, that their testimony was competent, but that the court disregarded it in the rendition of its decree. It is unnecessary to determine the competency of the evidence, for the reason that if it be considered, it would not, in our judgment, change the result. As we have seen, there is no considerable conflict, and when all is considered we can not say that the court erred in its finding.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

JAMES H. WALKER *et al.*

v.

ADAM ROSS *et al.*

*Filed at Springfield April 2, 1894.*

50:37 LRA 343n

1. **ASSIGNMENT**—*for benefit of creditors—defined.* An assignment for the benefit of creditors is a transfer, without compulsion of law, by a debtor, of some or all of his property to an assignee or assignees, in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. It implies a trust, and contemplates the intervention of a trustee.

2. An absolute conveyance made directly to the creditor in payment, or any form of lien given as security for the payment, of a *bona fide* debt, though having the effect to give the creditor a preference, is not an assignment for the benefit of creditors, within the meaning of the statute. Wherever such instruments have been held void under section 13 of the Assignment act, it has been upon the ground that, having been made in contemplation of an assignment in trust afterward actually executed, they were to be deemed a part of it. The statute does not contemplate a constructive assignment.

3. The court has repeatedly said that the statute contemplates no such thing as a constructive trust, and the cases in this court hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned, in trust, for the benefit of creditors.

4. **INSOLVENT DEBTORS**—*right to prefer creditors by sale or mortgage.* A debtor, solvent or insolvent, notwithstanding the statute relating to voluntary assignments, may lawfully transfer any part or the whole of his property in payment, or incumber it by mortgage, deed of trust in

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Brief for the Appellants.

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the nature of a mortgage, judgment confessed, or pledge, as security for the payment of such debts preferred. By selling or mortgaging his property directly to his creditors, the debtor exercises a clear, legal right. His right, by such means, to prefer some creditors to others, is not affected by the statute.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the County Court of Hancock county; the Hon. JOHN D. MILLER, Judge, presiding.

Messrs. SHARP & BERRY BROS., for the appellants:

It is not the form, but the effect, of an instrument which is to be considered in determining whether or not it is an assignment. *Watson v. Bayley*, 12 Pa. St. 164.

A lease has been held to constitute an assignment, and so has a power of attorney. *Lucas v. Railroad Co.* 32 Pa. St. 458.

A bond and mortgage. *Owen v. Arvis*, 26 N. J. L. 22.

A chattel mortgage. *Winner v. Hoyt*, 66 Wis. 227.

A chattel mortgage and bill of sale. *Burrows v. Heldroff*, 8 Iowa, 103; *Vanpatten v. Burr*, 52 id. 518.

Any form of instrument or instruments by which an insolvent debtor disposes of his entire property not exempt, or even substantially all, for the benefit of certain creditors, with preferences, is, in legal effect, an assignment for the benefit of all creditors. *Friend v. Yagerman*, 26 Fed. Rep. 814; *Martin v. Houseman*, 14 id. 160; *Kelley v. Richardson*, 21 id. 70.

It has been held by many courts that an assignment of all one's attachable property, which is intended to close up one's business, and does so at once, is a general assignment. *Murray v. Noyes*, 26 Vt. 473; *Noyes v. Hitchcock*, 29 id. 36; *Holt v. Bancroft*, 30 Ala. 250.

When Ross executed these two instruments and assigned his books of accounts, he intended to and did surrender the dominion of all his property, and hence the preferences are void. *Hanford v. Prouty*, 133 Ill. 339; *Hier v. Kaufman*, 134 id. 215; *Bank v. Rehm*, 126 id. 461; *Winner v. Hoyt*, 66 Wis. 227; *White v. Cotzhausen*, 129 U. S. 329.

Mr. J. W. MARSH, and Mr. W. N. GROVEN, for the appellees :

This court, in *Schroeder v. Walsh*, 120 Ill. 403, *Farwell v. Nilsson*, 133 id. 45, *Weber v. Mick*, 131 id. 520, *Farwell v. Cohen*, 138 id. 216, and *Young v. Clapp*, 147 id. 176, has given construction to the act relating to voluntary assignments.

An assignment contemplates the intervention of a trustee. A voluntary assignment for the benefit of creditors implies a trust, and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of creditors.

The transfer by a creditor of all his property does not, of itself, make what is termed a general assignment, but it must also be conveyed to trustees, to be held by them in trust for other creditors. *Burrill on Assignments*, (5th ed.) sec. 122; *Weber v. Mick*, 131 Ill. 520.

The acts of Ross did not constitute voluntary assignment. *Moore v. Meyer*, 47 Fed. Rep. 99; *Preston v. Spaulding*, 120 Ill. 208; *White v. Cotchausen*, 129 U. S. 329; *Bank v. Bank*, 136 id. 223; *Shapleigh v. Baird*, 26 Mo. 322; *Murray v. Logan*, 31 id. 91; *Johanson v. McAllister*, 30 id. 327; *State v. Benoist*, 37 id. 500; *Crow v. Beardsley*, 68 id. 437.

PER CURIAM: After a careful consideration of this case and the arguments of the respective parties, we are satisfied that the judgment of the Appellate Court is correct. In its opinion filed in the case, that court has fully considered every question involved, and, as we concur with the Appellate Court, the opinion will be adopted and filed as the opinion of this court. That opinion is as follows:

PLEASANTS, J.: "This was a petition to the county court, by appellees, creditors of appellant Ross, to have two chattel mortgages, given by said appellant to certain other creditors therein respectively named, upon his stock of goods in store at Warsaw, declared to be a general assignment under the statute, and appellant Helms required to give bond, as as-

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Opinion of the Court.

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signee, to administer the property in accordance with the orders of the court. Appellants answered severally, replications were filed and evidence heard, whereupon appellant Ross moved the court to dismiss the case as to him, which was denied, and an order entered substantially according to the prayer of the petition, and a motion by each of the appellants for a rehearing overruled. They then took this appeal.

"For quite a number of years prior and until the 13th of August, 1892, appellant Ross was a dry goods merchant at Warsaw. Having become embarrassed, and being pressed for payment and threatened with suits, on that day he went to Chicago to consult some business friends and creditors upon the situation stated, and upon their advice executed a chattel mortgage upon his entire stock to certain creditors therein named, to secure an aggregate indebtedness due them of \$8145.13, setting forth the amount due to each, respectively, and delivered it to Robert R. Baldwin, an attorney of the John V. Farwell Company, one of the mortgagees. On the same day he made and signed a second mortgage upon the same stock to certain other creditors therein named, including the appellees, to secure an aggregate indebtedness to them of \$3495.79, setting forth the amount due to each, respectively, but did not deliver it until the 15th. These instruments were in the usual form of chattel mortgages, with the usual defeasance clauses, and gave to the mortgagees power to sell at public or private sale, and for cash or on credit, as they should think best, and in addition thereto contained the following: 'The said mortgagor hereby authorizes the sheriff of the said county of Hancock to execute the power of sale in this mortgage granted to the mortgagees or their assigns or legal representatives, and all other powers to them, or either of them, granted or given by this mortgage.' And the second was therein expressly declared to be subject to the first. The following evening (August 14) appellant Ross left Chicago on his return to Warsaw, accompanied by Mr. Baldwin, who had

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Opinion of the Court.

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the first mortgage, and was acting for and under the direction of the John V. Farwell Company, and had telegraphed to have appellant Helms, then sheriff of Hancock county, meet him there on his arrival. They arrived shortly before noon of the 15th, and went to the store. After Ross had gone to his dinner, Baldwin obtained the keys from the clerks and took possession. He then turned them over to the sheriff, with the mortgage, directing him to take care of the stock and to sell as provided in the mortgage, referring him to Mr. Grover as the attorney of the company, if he should need any advice. When Ross, on his return, found the sheriff in possession, he acknowledged the second mortgage, and delivered it to the magistrate for the mortgages to be recorded, and then assigned his notes and book accounts, which were of small value, to still other creditors,—Mrs. Miller and Mrs. Geitz,—to pay *bona fide* debts then due and owing from him to them. Thus he disposed of all the property he had that was not exempt by law from execution.

"On the 16th an expert from the house of the Farwell company, assisted by Ross and his clerks, took an invoice of the goods mortgaged, making it amount to over \$13,000, which exceeded the sum of his indebtedness. Under the direction of the first mortgagees, the sheriff, on the 18th, duly advertised the stock for sale at public auction on the 29th, and in pursuance thereof sold it for \$7166.49, which he now holds, subject to the decision of this case.

"Both of the mortgages were dated August 15, 1892. The first was recorded on the 23d and the second on the 16th of said month. It further appears that the Farwell company acted solely for the first mortgagees; that Baldwin acted solely for the Farwell company; that neither had any interest in or connection with the second mortgage or the assignment of the notes and book accounts; that the sheriff acted for and under direction of the first mortgagees; that when Ross left Chicago he did not know what Baldwin intended to do, but was in-



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Opinion of the Court.

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formed by him before they arrived at Warsaw; that he supposed his stock would pay his indebtedness in full, and did not intend to make an assignment for the benefit of his creditors, under the statute, but did intend that in case of its deficiency the first mortgagees should be preferred.

"There is no serious dispute as to what appellant Ross in fact did or intended to do. His answer admits nearly all of the averments in the petition. The question is, whether these acts and intentions amounted, in legal effect, to an assignment for the benefit of his creditors, within the meaning of chapter 10 of the Revised Statutes of 1891. The county court held that they did; that that court therefore had jurisdiction of the matter, and that the preferences attempted to be given were void, (sec. 13,) and accordingly ordered that appellant Helms give bond, as assignee, and proceed in the distribution of the moneys in his hands, the proceeds of said sale, under the further direction of the court. Whether this holding was proper, depends upon the true construction of the statute. In quite a number of cases the Supreme Court has given it a construction applicable to the conceded facts shown by this record. Without presuming to vindicate that construction, or quoting *in extenso* from the opinions in these cases, we shall refer to them only far enough to warrant, in our opinion, the conclusion that it is in conflict with that of the county court given in this case.

"First, as to what constitutes an assignment within the meaning of the act. In *Weber v. Mick*, 131 Ill. 533, the court approved and adopted the definition in Burrill on Assignments, sections 2 and 3: 'A transfer, without compulsion of law, by a debtor, of some or all of his property to an assignee or assignees, in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. It implies a trust, and contemplates the intervention of a trustee; and assignments to creditors directly, and not upon trust, are not such.' In

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Opinion of the Court.

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*Schroeder v. Walsh*, 120 Ill. 403, it was said: 'Notwithstanding that statute, a debtor may pay one creditor in full, either in money or by the sale of his property. That act applies only to conveyances of property to an assignee or trustee in trust, to convert the same into money for the benefit of the creditors of the assignor.' In *Farwell v. Nilsson*, 133 Ill. 45, the court outlines such an assignment as, 'it has always been understood in this State,' being 'a written deed of conveyance executed by the assignor, as party of the first part, to the assignee, as party of the second part, reciting the grantor's indebtedness and inability to pay, and conveying his property, real and personal, by apt words of sale and transfer, to the assignee, in trust, to take possession of and sell the same, and to collect the outstanding debts, and out of the proceeds to pay the creditors,' and holds that it was preferences in instruments such as are above described that the legislature intended to prohibit. The mere form of the instrument is no doubt immaterial, provided the operation of it is to create a trust in the property conveyed, for the benefit of the creditors. It must be an actual trust, created by operation of the instrument itself. The court has repeatedly said that the statute contemplates no such thing as a constructive trust.

"These cases further hold, that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned, in trust, for the benefit of creditors, and hence that absolute conveyances made directly to the creditor, in payment, or any form of lien so given as security for the payment, of a *bona fide* debt, though having the effect to give him a preference, is not an assignment for the benefit of creditors, within the meaning of the statute. Wherever such instruments have been held void under section 13, it has been upon the ground that, having been made in contemplation of an assignment in trust afterwards actually executed, they were to be deemed a part of it. (*Preston v. Spaulding*, 120 Ill. 208; *Young v. Clapp*, 147 *id.* 176.) Other-

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Opinion of the Court.

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wise a debtor, solvent or insolvent, notwithstanding the statute, may lawfully transfer any part or the whole of his property, absolutely, in payment, or encumber it by mortgage, deed of trust in the nature of a mortgage, judgment confessed, or pledge, as security for the payment of such debts preferred. *First Nat. Bank of Chicago v. North Wisconsin Lumber Co.* 41 Ill. App. 343; *Young v. Clapp*, 147 Ill. 176, and cases *supra*.

"We perceive no conflict between these cases, or any of them, and that of *Farwell v. Cohen*, 138 Ill. 216, so much relied on by counsel for appellees as to what is necessary to constitute an assignment for the benefit of creditors. In the latter it is defined just as in *Weber v. Mick* and others, and in its application to the instrument there in question, which was in the form of a bill of sale of a stock of goods from the debtor to one of his creditors, the court held that on its face it was an absolute transfer of the whole interest, legal and equitable, in the property, without any condition of defeasance providing for its return upon payment of the debts mentioned, and was made to Cohen expressly in trust, as well for the benefit of other creditors named, with preferences. By all the tests stated in the other cases or here sought to be applied, it must have been held an assignment within the meaning of the statute. By the same tests stated in that case and the others cited, those here in question were not. The notes and book accounts of the debtor were absolutely assigned directly to the creditors named, involving no trust, but in payment of debts not denied to have been *bona fide* due and owing by him to them. The others were also made directly to the creditors therein respectively named, without the intervention of any trustee or the creation of any trust for the benefit of creditors, and they were both, in form and effect, chattel mortgages. They did not, in terms or effect, absolutely transfer the whole interest of the debtor, legal and equitable, in the property. They did contain a condition of defeasance providing for its return upon payment of the debts mentioned.

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Opinion of the Court.

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"From the fact that they were given to secure the payment of notes so soon to become due, and the assumption, which we do not say was unwarranted, that having thereby disposed of all his property Ross had no hope or intention to redeem, but expected to go out of business, it is argued that the liberal construction of the statute, as being 'intended mainly for the benefit of creditors of the insolvent, so as to prevent the evils and advance the remedy in view, which the court has so often declared to be proper, would hold these instruments to be, in effect, an assignment in trust within its provisions, or in fraudulent evasion of its provisions.' This would be a constructive assignment—a thing which the statute does not contemplate. The premises from which this conclusion is drawn do not change the character of the instruments. They are still but securities given to the creditor directly, and subject to the right of redemption, with no trust whatever for the benefit of creditors, but, at most, a trust as to the excess, if any, for the benefit of the debtor, which the law would imply if it were not expressed. And the court say in *Farwell v. Nilsson*, *supra*, that to hold such an instrument to be an assignment would not be construction even the most liberal, but judicial legislation.

"In the cases cited by counsel,—*Hide and Leather Nat. Bank v. Rehm*, 126 Ill. 461, *Hanford v. Prouty*, 133 id. 355, and *Hier v. Kaufman*, 134 id. 223,—the instruments in question were followed by actual assignments, and the language relied on must be considered as referring to such cases. *White v. Cotzhausen*, 129 U. S. 329, also cited, was expressly based on *Preston v. Spaulding*, which was a like case. In *Moore v. Meyer*, 47 Fed. Rep. 99, this case was explained and the Illinois cases reviewed in an elaborate opinion by Judge Allen, (United States Circuit Court for Southern District of Illinois,) and it is held as in accordance with the construction of the statute by our Supreme Court, that such instruments do not, of themselves, even in effect, constitute an assignment. Nor, when not made in view of an actual assignment following, can

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Opinion of the Court.

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it be regarded as a fraudulent evasion of the statute, because the debtor, though intending to appropriate all his property to the payment of his debts, is not bound to make an assignment. In so appropriating it by absolute conveyances or mortgage directly to the creditors therein named, not creating a trust, he exercises a clear, legal right, and may thus distribute it as he sees fit. His right by such means to prefer some creditors to others is not affected by the statute. Appellant Ross did not intend to make an assignment for the benefit of creditors, and never did make it, for the reason that he did intend to make preferences, and knew he could not do so by such an instrument.

"It is claimed that the authority to the sheriff of Hancock county to execute the powers given to the mortgagees made him a trustee and the mortgages an assignment. We think not. They did not purport to give him any interest, legal or equitable, in the property. They did not appoint him to execute the powers referred to, but only authorized him to do so as far as the mortgagor was concerned. Under that authority he could do nothing with it except by consent and under direction of the mortgagees. They, as a body, could not take possession or sell, but must act through some individual, and the mortgagor, on his part, consented that the sheriff might act for them. They could have appointed another, notwithstanding the authority given him by the mortgagor. Baldwin did, in fact, first take possession, and he turned it over to the sheriff as a mere minister, without title or interest. He could have done nothing in the premises in his own name or right. Nor did he affect or pretend that he could or did. He was in no sense an assignee or trustee.

"For the reasons stated we are of opinion that the county court erred in its holding and order, which will therefore be reversed."

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

MARGARET BENSON *et al.*

v.

WILLIAM HALL *et al.**Filed at Mt. Vernon April 2, 1894.*

1. **DEED—delivery necessary to validity.** Where a party signing and acknowledging a deed to his two sons is shown to have had a fixed purpose to give his land to them to the exclusion of his daughter, and believed he had accomplished that purpose by such deed, yet if he did not deliver the same in his lifetime, or intend it to take immediate effect without delivery, it will be void, and pass no title.

2. A father had made a deed of land to his two sons, and placed the same in the hands of his wife, and the day before his death he had his wife bring him the deed, and he then gave the same to one of his sons, stating that was for him and his brother: *Held*, that these facts showed the delivery of the deed.

3. **WILL—recital of a gift not made.** Where the testator, in his will, recites that he has, by some instrument other than the will, given property to a person named, when, in truth and in fact, he has not done so, such erroneous recital will not disclose a purpose and intent to give by the will. In such case resort must be had to the other instrument, and not to the will.

APPEAL from the Circuit Court of Madison county; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. LEVI DAVIS, Jr., and Mr. JOHN F. MCGINNIS, for the appellants:

Where a deed purporting to convey a present absolute estate is intended by the grantor to take effect at his death, and remains under his control during his lifetime, it becomes inoperative for want of a delivery; and this is true even in cases of voluntary settlements. *Byars v. Spencer*, 101 Ill. 429; *Cline v. Jones*, 111 id. 563; *Bovee v. Hinde*, 135 id. 137; *Otis v. Spencer*, 102 id. 622; *Benneson v. Aiken*, 102 id. 284.

Where a recital in a will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital, property, when, in fact, he has

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Brief for the Appellees.

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not done so, such erroneous recital will not disclose a purpose or intent to give by the will, and resort must be had to the other instrument, and not to the will. *Hunt v. Evans*, 134 Ill. 496.

The defendants claim the land by another title than that acquired under the Statute of Descents, and are therefore incompetent to testify against complainants, who claim as heirs of their deceased father. *Treleaven v. Dixon*, 119 Ill. 548; *Way v. Harriman*, 126 id. 132; *Shaw v. Schoonover*, 130 id. 455.

It is not competent to control the effect of the deed by parol evidence when it has once taken effect by delivery, but it is always competent to show that the deed, although in the grantee's hands, has never, in fact, been delivered, unless the grantor, or those claiming through him, are estopped in some way from asserting the non-delivery of the deed. *Jordan v. Davis*, 108 Ill. 336; *Price v. Hudson*, 125 id. 287; *Bovee v. Hinde*, 135 id. 137.

MR. JOHN J. BRENHOLT, for the appellees:

It is not essential to the delivery of a deed that it shall pass from the hand of the grantor to the grantee. Any disposition of the deed by the grantor with the intention thereby to make delivery of it, so that it shall become presently effective as a conveyance of title, will, if accepted by the grantee, constitute a sufficient delivery. The intention to deliver, on one hand, and the acceptance on the other, may be shown by direct evidence of the intention, or both acts and declarations, of the parties, constituting parts of the *res gestæ* which manifest such intentions. *Price v. Hudson*, 125 Ill. 284.

Where a deed duly executed is found in the hands of the grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. *Tunison v. Chamblin*, 88 Ill. 379; *McCann v. Atherton*, 106 id. 31; *Griffin v. Griffin*, 125 id. 430.

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Opinion of the Court.

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Any paper may be referred to so as to become a part of the will, in order to ascertain the real intention of the testator in the disposition of his estate. It must be in existence at the time, and identified as the paper referred to. 1 Redfield on Wills, (3d ed.) 261-268.

The recitals in the will of Hall show that he had conveyed to his widow and sons certain property by deeds, which deeds were properly executed, and consequently both the will and deeds may be resorted to to disclose the purpose and intent of the testator, and the deeds, having been executed several months prior to the making of the will, are made a part thereof by recitals. *Hunt v. Evans*, 134 Ill. 505.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

This was a bill in chancery by Margaret Benson and husband and Hannah Long and husband, against William Hall, John Hall and Jane Hall, for partition and assignment of dower. The complainants Margaret Benson and Hannah Long, and the defendants William and John Hall, are the only surviving children and heirs-at-law of William Hall, deceased. The defendant Jane Hall is his widow. William Hall died January 10, 1892. On the 20th of November, 1889, he signed and acknowledged two deeds, one conveying to Jane Hall, his wife, a part of the real estate described in the bill, and the other (his wife joining) to his said sons, all the remainder thereof. On the 19th of April, 1890, he executed his last will and testament, giving to each of his daughters the sum of \$100, and to each of his sons one dollar, stating that it, together with the advances made both of them from time to time, "and the real estate I have deeded them, to be in full satisfaction of their share of my estate." He also gave to his wife one dollar, and stated that it, "in addition to what I have already deeded to her, to be in lieu of her dower in my estate." Complainants, in their bill, proceed upon the theory that the lands described are intestate estate of their father, and



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Opinion of the Court.

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upon his death descended to his four children in equal shares, as tenants in common, subject to dower in his widow. The defendants, in their answer, set up the deeds of November 20, 1889, and the will of William Hall, and claim title under the same. The cause was heard in the court below on the bill, answer, replication and proofs, and a decree entered dismissing the bill at complainants' costs, and they appeal.

Appellants insist that the deeds under which appellees claim were never delivered. This appellees deny, and also claim that even if they were not, they, with the will of the grantor, vest title in them. In support of this last position, *Hunt v. Evans et al.* 134 Ill. 496, is cited. But that case is directly to the contrary. We there said: "But where the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital, property, when, in truth and in fact, he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the devisor to give by the will, and in such case resort must be had to the other instrument, and not to the will, by persons interested." Our decision, then, must finally turn upon the single question, was there a sufficient delivery of the deeds set up in the answer to pass the title.

That Hall had, for several years prior to his death, a fixed purpose to give the lands to his sons and wife, to the exclusion of his daughters, and that he believed he had accomplished that purpose by these deeds, the evidence leaves no room for doubt. Nevertheless, if he did not deliver them during his lifetime, or intend them to take immediate effect without delivery, they were void. The sons were members of their father's family at the time the deeds were made, and remained so to the time of his death, William then being twenty-six and John twenty-three years of age. The deeds were acknowledged before a justice of the peace, in the city of Alton. After detailing the circumstances attending their execution, he says: "I was about passing them over to Mr. Hall. There

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Opinion of the Court.

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were the two—one for the boys and one for Mrs. Hall—and I offered them to Mr. Hall, and he said, 'Just pass them over to my wife,' and I passed them over to her at that time." He also testified, that at the time of their execution Hall objected to a clause being put in the one to the sons, to the effect that they should not come into possession of the property until after his death, saying, "He didn't know what might turn up during his lifetime, and he didn't want the property to entirely go out of his possession. \* \* \* If the property was not disposed of in his lifetime, he wanted the boys to have it after his death. The same remarks applied to Mrs. Hall's deed." The evidence also shows that he did retain possession and control of the land, and paid the taxes assessed against it, the sons working on it, substantially as before the deeds were made. The question then remains, were they actually delivered before his death. About ten days before he died, he directed his wife to get them, that a neighbor might read them to him, and she did so, bringing them from "up stairs." After they were read they were handed back to her, he telling her "to put them where she got them." A niece of Mrs. Hall, thirteen years old, who had been raised in the family, testified that the day before his death he told his wife to "get the deeds," which she did, and handed them to him; that he at the same time told her to call the boys in; that "he gave Will one, and said that was for him and John, and gave Auntie one, and said that was for her."

It is contended in the argument of counsel for appellant, that the testimony of the witness is too indefinite as to the identity of the deeds to amount to proof of their delivery. We do not agree with that view. If her statements as to what was done and said are true, there can be no reasonable doubt that the papers then delivered were the deeds in question. An effort is also made to discredit the girl upon the ground that her story is an improbable one, bearing on its face ear-marks of being manufactured for the occasion. After carefully read-

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Opinion of the Court.

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ing her testimony at length, from the record, we are unable to find any justifiable grounds upon which to base so serious a charge. She manifests no want of intelligence in her manner of testifying. What she states must be substantially true or willfully false. It is not a matter about which she may have been mistaken. In view of the fact that Hall intended these deeds to take effect at his death, had manifested anxiety about them ten days before, and his near approach to death, the occurrence, as she details it, was not an unnatural or improbable one. Therefore her evidence could only be discredited by arbitrarily saying, that on account of her youth and close relationship to one of the interested parties she should not be believed. This the court below was evidently not willing to do, nor are we.

But it is said, the delivery of the deeds as described by her is inconsistent with the statements and conduct of the widow after her husband's death, as shown by the testimony of one Emery. He testified that the day of Hall's death the deeds were handed to him by the widow "to be sent over for record," and that she then said, "that these were those papers that Mr. Hall requested that she should hand to me, if anything happened to him, to send over for record." The widow herself, and others present when she handed the papers to the witness, remember her language differently from his statement of it; but admitting that she said all he says she did, we are unable to see how it tends to discredit the testimony of the girl. Giving directions as to having the deeds recorded was in no way inconsistent with their having been delivered.

We think the decree of the circuit court is in harmony with the evidence in the case, and it will accordingly be affirmed.

*Decree affirmed.*

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## JACOB SIMONS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Filed at Springfield April 2, 1894.*

1. **CRIMINAL LAW—MURDER—evidence—letters written by defendant and found in his possession.** On the trial of a man for the murder of a young woman by poison, letters found in his possession, addressed to the deceased and shown to be in the handwriting of the defendant, tending to prove the relations existing between them, and thus tending to prove the motive, are admissible in evidence against the defendant without direct proof that the letters had been delivered to the deceased.

2. **SAME—what are dying declarations.** Dying declarations are such as are made relating to the facts of an injury of which the person making them afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance, and without hope of escaping the impending danger.

3. About twenty-five minutes before the death of a woman from poison, she stated to her sister that the defendant, to whom she was engaged to be married, had given her a capsule to bring back her monthly courses; that she gave way to this man. Before these declarations, in speaking to her two sisters about the capsule, she stated, "I believe it will kill me." Before making this statement she threw up her arms and said to one of her sisters, "Don't leave me any more." When the declarations were made her mind seemed to be perfectly clear, and one convulsion had followed another for over an hour, each with increased severity: *Held*, that the statements of the deceased were properly admitted in evidence against the defendant as dying declarations.

4. **SAME—witness not named on indictment.** It is not error to allow a witness to testify in a criminal case whose name is not on the indictment, and when no notice has been given that the witness would be called. It is a matter resting in the sound discretion of the court.

5. **WITNESS—impeachment—former conviction of perjury.** The fact that a defendant in a criminal prosecution may have been convicted of perjury in another State will not disqualify him as a witness. His conviction can only be shown for the purpose of affecting his credibility. For that purpose his conviction may be shown by the record, but not by parol, if objection is made to proof of the fact by parol.

6. **EVIDENCE—parol, to prove a conviction of infamous crime.** The judgment of the court where the conviction of a defendant is had, is the only competent evidence to establish the conviction, and that judgment can only be established by producing the record of the judg-

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 Brief for the Plaintiff in Error.
 

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ment, or an authenticated copy of the record. It can not be shown by parol evidence, if objection to such evidence is made when offered.

7. *SAME—out of its proper order.* The trial court may, in its discretion, allow evidence in rebuttal which strictly should have been offered in chief.

8. *PRACTICE—excluding evidence after its admission.* While it is true a court has no right to admit improper evidence, yet when that has been inadvertently done, and the court, as soon as the mistake is discovered, promptly rules out the evidence, a judgment ought not, as a general rule, to be reversed for such an error.

9. *SAME—compelling witness to appear—party must take proper steps.* The record showed that on the trial of one for murder, a witness who had testified for the People, being called for the defendant, did not appear. The record failed to show that the witness had been subpoenaed, that an attachment had been asked or denied, or that the court was requested to take any action to compel the attendance of the witness: *Held*, that there was no ground of complaint shown, to the action of the court.

10. *INSTRUCTIONS—repeating.* Where the instructions given for a defendant contain all the law necessary to be given to the jury to enable them to pass upon his guilt or innocence, there is no necessity for giving other instructions.

WRIT OF ERROR to the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. PEIRCE & PORTER, for the plaintiff in error:

Evidence as to a dying declaration ought to be received with caution. The testimony in this case is not sufficient to warrant the admission of the dying declarations. *Starkey v. People*, 17 Ill. 17; *Digby v. People*, 113 id. 123; *Westbrook v. People*, 126 id. 81; *Tracy v. People*, 97 id. 101; *Rex v. Taylor*, 3 Cox's C. C. 84.

Any hope of recovery, however slight, existing in the mind of the deceased at the time the declarations are made, will render the declarations inadmissible. 3 Russell on Crimes, (9th Am. ed.) 252; *Digby v. People*, 113 Ill. 123; *Errington's case*, 2 Lew. 148; *Rex v. Crockett*, 4 C. & P. 444; *Railroad Co. v. Slipsbury*, 7 id. 187; *People v. Hodgdon*, 55 Cal. 76; *Jackson v. Commonwealth*, 19 Gratt. 656.

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Brief for the Plaintiff in Error.

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The use of the expression, "I am sure to die," is not sufficient to warrant the admission of a dying declaration, and does not indicate that state of mind of the deceased making the statements thereafter admissible. *Railroad Co. v. Osman*, 15 Cox's C. C. 1.

Dying declarations, though proved to have been made by persons in a dying state, are not admissible, unless it also appears that the individual knows that he is in immediate danger of dissolution; and the opinions of witnesses as to the condition or state of the individual are not admissible. See 2 Russell on Crimes, 250; Wharton on Crim. Ev. par. 276.

Before the evidence of a dying declaration is admissible to go to the jury, the evidence must show to the court, beyond a reasonable doubt, that the party is *in extremis*. *Starkey v. People*, 17 Ill. 20; *Tracy v. People*, 97 id. 101.

Evidence which is mere matter of opinion is not admissible. (*Sahlinger v. People*, 102 Ill. 241.) Nor will mere opinion that death will result from the injury render dying declarations admissible. 1 Bishop on Crim. Proc. sec. 1212; *Rex v. Van-Putchell*, 3 C. & P. 629; *Smith v. State*, 9 Humph. 9; *Rex v. Foster*, 10 Cox's C. C. 368.

That it was improper to compel the defendant to answer on cross-examination, over his objection, the question as to whether he was convicted of another crime, or the crime of perjury, see 1 Bishop on Crim. Proc. sec. 1122; *Hoberg v. State*, 3 Minn. 262.

The evidence was not competent for the purpose of impeaching defendant's testimony. That could only be done by proving his general reputation for truth and veracity to be bad. *Gifford v. People*, 87 Ill. 211; *Dimick v. Downs*, 82 id. 570; *Frye v. Bank*, 11 id. 367.

Our own court and other courts have decided that those who undertake to discredit a witness or party because of his conviction of an infamous crime must make legal proof of that fact, and that the same can only be proved by the record,

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Brief for the People.

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including the judgment of a court of competent jurisdiction. *Bartholomew v. People*, 104 Ill. 607; *Greenleaf on Evidence*, sec. 375; *People v. Herrick*, 13 Johns. 82; *Commonwealth v. Gorham*, 99 Mass. 420.

The error in admitting this evidence was not cured by its subsequent exclusion. *Quinn v. People*, 123 Ill. 333.

The letters were incompetent, because they were irrelevant to the issue, did not contain any threats or admissions, and nothing throwing any light on the issue in the case. They did tend to prove that the defendant was immoral, and had been guilty of committing sexual intercourse with some individual not shown to be the deceased. That evidence of this kind is not competent as against him, see *Farris v. People*, 129 Ill. 521; *Gifford v. People*, 87 id. 211.

That the letters were incompetent evidence as against the defendant, because they had been unlawfully obtained, see *Boyd v. United States*, 116 U. S. 616.

MR. JOHN A. STERLING, State's Attorney, MR. M. T. MOLONEY, Attorney General, MR. T. J. SCOFIELD, and MR. M. L. NEWELL, for the People:

The rule of law, well established as to the admissibility of dying declarations, is laid down in the following cases: *Barrett v. People*, 54 Ill. 329; *Scott v. People*, 63 id. 511; *Starkey v. People*, 17 id. 17; *State v. Baldwin*, 79 Iowa, 714; *State v. Nash*, 7 id. 347; *People v. Lee*, 17 Cal. 76.

The fact that deceased was conscious of impending death may be gathered from the circumstances of the case, the nature of the injury and state of the body, and from expressions used by the deceased. *Taylor on Medical Jur.* 33, 34; *Starkey v. People*, 17 Ill. 17; *State v. Nash*, 7 Clarke, 347; *Kilpatrick v. Commonwealth*, 7 Casey, 198; *Commonwealth v. Roberts*, 108 Mass. 301; *People v. Ybarra*, 17 Cal. 166; *State v. Gillick*, 7 Clarke, 287.

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Brief for the People.

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The statements made by the deceased form a part of the *res gestæ* in this case. The rule as to their admissibility on this ground is laid down in the following cases: *Railway Co. v. Becker*, 128 Ill. 545; *Lander v. People*, 104 id. 248; *Insurance Co. v. Mosley*, 8 Wall. 397; *Paryear v. Commonwealth*, 83 Va. 51; *People v. Vernon*, 35 Cal. 49; *Elkins v. McKean*, 79 Pa. St. 493; *Commonwealth v. McPike*, 3 Cush. 181; *State v. Baldwin*, 79 Iowa, 704; *State v. Schmidt*, 73 id. 469; *State v. Driscoll*, 72 id. 583; *Commonwealth v. Hackett*, 2 Allen, 136; *Driscoll v. People*, 47 Mich. 413; 1 Greenleaf on Evidence, sec. 108.

Letters written by defendant are admissible in evidence against him if relevant to the issues. These letters tend to prove motive. Even though they were found in his possession, and there is no showing that they were ever delivered to deceased, they are competent. *State v. Stair*, 87 Mo. 268; *State v. Briggs*, 68 Iowa, 416; *People v. Cassidy*, 133 N. Y. 612; Wharton on Evidence, sec. 1123.

A medical witness, in giving his opinion as an expert, is not confined to opinion derived from his own observation and experience, but he may give an opinion based upon information derived from medical books. *Siebert v. People*, 143 Ill. 571.

The remarks complained of as having been made in the opening statement and closing argument for the People were proper. *Siebert v. People*, 143 Ill. 571.

It is not error for the trial court to permit witnesses whose names are not indorsed on the indictment, to testify for the prosecution, without notice to the defendant. It is discretionary with the court. *Bulliner v. People*, 95 Ill. 394; *Logg v. People*, 92 id. 598; *Smith v. People*, 74 id. 144.

Even though the admission of the evidence complained of was improper, the error was cured by its exclusion from the consideration of the jury. *Railroad Co. v. Fietsam*, 123 Ill. 519.



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Opinion of the Court.

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Mr. JUSTICE CRAIG delivered the opinion of the Court:

The plaintiff in error, Jacob Simons, was indicted at the February term, 1893, of the circuit court of McLean county, for the murder of Susie Hoover, by administering strychnine poison to her. To the indictment the defendant pleaded not guilty, and on a trial before a jury he was found guilty as charged in the indictment, and his punishment was fixed at imprisonment in the penitentiary for life. The court overruled a motion for a new trial and rendered judgment on the verdict, to reverse which this writ of error was sued out.

Upon an examination of the record it appears that Susie Hoover died at the home of her sister, Mrs. Ara Banks, in McLean county, on the 20th day of October, 1892. She was then past eighteen years of age, and a daughter of A. L. Hoover. In November, 1889, Hoover moved from McLean county to Missouri. His family then consisted of himself, his wife, a sister of the defendant, his two daughters, Anna and Susie Hoover, by a former marriage, and Stella Willoughby, a daughter of his then wife by a former marriage. The defendant went with Hoover to Missouri to assist him in taking care of stock that he was shipping to that State. After the Hoovers arrived in Missouri the defendant lived in the family, and did chores and assisted some about the barn. He was then about forty years old, and Susie Hoover was a girl of fifteen. Soon after the family had arrived at Freeman, Mo., the defendant commenced to pay attention to Susie. To this Hoover and his wife objected, and to all outward appearance it was stopped, but it appears from the testimony that defendant secretly kept up his relations with the girl, and from letters read in evidence it seems that from June, 1890, until the death of Susie Hoover, he had frequent illicit intercourse with her. In the month of September, 1892, Mrs. Hoover died, and her body was brought to McLean county for burial. The family and the defendant came with the remains, and

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Opinion of the Court.

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stopped at the house of Mrs. Banks, a married daughter of Hoover. Hoover concluded to remain in this State, and after the burial of his wife returned to Missouri to settle up his business. In a short time he came back to this State, and again started for Missouri on Wednesday, October 19, 1892, the day before Susie's death. While the family was stopping at the home of Mrs. Banks, the defendant took Susie to Leroy, to Farmer City, and one or two other places. While at Farmer City, on Thursday before the death of Susie, they stopped with one Halloway, and took dinner. While there they made arrangements to return to Halloway's place on the next Thursday and get married. After leaving Halloway's the defendant and Susie went to Whitsell's, a sister of the deceased, and remained there over night. Next day the defendant returned to Banks' place and remained until Sunday morning, when he left, and did not return until Thursday, the 20th, about noon. Soon after arriving, the defendant went up stairs into a room where Anna Hoover was sick, and asked her how she was, and then went across the hall where he kept his trunk, which he packed and tied a rope around it. He then went down stairs, and the family went to the table for dinner. About one o'clock the defendant was asked to take dinner, but declined. He remained in the dining room until dinner was over, and while Susie and Miss Willoughby were looking after the dishes he spoke to Susie, and a whispered conversation occurred between them for a moment, when the defendant again went up stairs to the room where he had left his trunk. In a few minutes Susie followed, and the two were in the room alone from five to ten minutes. During this time Anna, the sick sister across the hall, was alarmed to hear Susie exclaim, "Don't, Jake!" three times, and the defendant exclaim, "Yes, Susie," three times. She at the same time heard a noise in the room, like a scuffle between the parties. A short time afterwards Miss Willoughby went to the room where the two parties were, and soon Banks came in. The trunk was taken down stairs,

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Opinion of the Court.

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and the defendant and Banks left in a wagon for Ellsworth, a railroad station a few miles distant. In about twenty minutes after the defendant left in the wagon, Susie was taken sick with convulsions, and died in a little less than two hours afterwards. Dr. Patch, of Ellsworth, having been called, arrived at the house ten minutes after four o'clock. He found Susie lying on the dining room floor. He carefully examined all the symptoms, and questioned the dying girl fully in regard to her condition and the cause of the difficulty. After the doctor arrived she had five or six convulsions, and died in a convulsion about twenty minutes after his arrival, at 4:30 P. M. The nature and cause of the sickness were fully explained by Susie to the doctor a few minutes before her death. The physicians all agree that the symptoms disclosed the fact that death was the result of strychnine poisoning. That evening the doctor in charge removed the stomach and uterus from the body. The uterus contained a foetus from four to eight weeks old.

On the trial the court permitted the prosecution to prove that Susie Hoover stated, about twenty-five minutes before her death: "I have been keeping company with a young man. We are engaged to be married. I thought that maybe I was in the family-way. My monthly sickness didn't come around. He got me some medicine at Farmer City,—a capsule,—and gave it to me to take, to bring my monthly sickness on me." "What did she say, if anything, about having submitted to this man?" "She said, 'I gave way to him.'" Before this evidence was admitted, it was proven before the court that the deceased stated to her two sisters, in speaking about the capsule, "I believe it will kill me." Before making this statement, in her extreme suffering, she threw up her arms and said to one of her sisters, "Don't leave me any more," and at the same time, as the witness expressed it, "grasped around me."

Dying declarations are such as are made, relating to the facts of an injury of which the party afterwards dies, under

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Opinion of the Court.

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the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance, and without hope of escaping the impending danger. (*Starkey v. The People*, 17 Ill. 17.) When the declarations were made the mind of the deceased seemed to be perfectly clear. One convulsion had followed another for over an hour, and each succeeding one with greater severity, and when she declared, "I believe it will kill me," and implored her sister not to leave her, in the manner disclosed by the evidence, it is apparent that she fully realized that death was near and inevitable. From the evidence before the court but one conclusion could be reached, and that is that the deceased believed and fully realized that the approach of death was near at hand, from which she had no hope of escape. We think the evidence may be regarded as dying declarations, and was properly admitted by the court as such.

The defendant was called as a witness, in his own behalf, and on cross-examination he was asked if he was not indicted and convicted of perjury in the circuit court of Barber county, West Virginia, in 1880. A general objection was interposed to the question, overruled, and the witness answered, "I was." The ruling of the court in the admission of this evidence is relied upon as error. The fact that the defendant may have been convicted of perjury would not disqualify him as a witness. His conviction could only be shown for the purpose of affecting his credibility. For that purpose the People had the right to prove a conviction, but they had no right to prove the fact by parol evidence. The judgment of the court where the conviction was had was the only competent evidence to establish a conviction, and that judgment could only be established by producing the record of the judgment or an authenticated copy of the record, as we have heretofore held in *Bartholomew v. The People*, 104 Ill. 608. It is clear that the prosecution had no right to prove, by parol, that the defendant was convicted of an infamous offense, but

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Opinion of the Court.

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the evidence was not objected to on the ground that the fact could not be proved by parol. It was not suggested to the court that the fact of conviction could only be proved by an authenticated copy of the record. Had the objection been made on this ground, doubtless the court would have excluded the evidence. The general objection made by the defendant was not sufficient. Moreover, on a subsequent day the court excluded the evidence from the jury, and directed them not to consider it. While it is true a court has no right to admit improper evidence, yet when that has inadvertently been done, and the court, as soon as the mistake has been discovered, promptly rules out the evidence, a judgment ought not, as a general rule, to be reversed for such an error.

A large number of letters written by the defendant to Susie Hoover were admitted in evidence, and this ruling is objected to by the defendant. These letters were proved to be in the handwriting of the defendant. They tended to prove the relations existing between him and the deceased, and thus tended to prove the motive. These letters were all found in the possession of the defendant after his arrest, and it was not proved directly that they had been delivered to the deceased when written, and subsequently obtained by him from the possession of the deceased, yet, under the authorities, it seems to be well settled they were admissible. *State v. Stair*, 87 Mo. 268; *State v. Briggs*, 68 Iowa, 416; *The People v. Cassidy*, 133 N. Y. 612; Wharton on Evidence, sec. 1123.

It is also claimed that the court refused to compel the attendance of witnesses on behalf of the defendant. The only ground for this contention which we find in the record is the fact that Mrs. Dr. Patch, who had testified on behalf of the People, being called on behalf of the defendant, did not appear. But the record fails to show that she had been subpoenaed, that an attachment was requested or denied, or that the court was requested to take any action whatever to compel the attendance of the witness. Under such circumstances we

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Opinion of the Court.

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fail to see any ground upon which the defendant can complain of the action of the court in this regard.

It is also claimed that the court erred in permitting a witness to testify for the People, in rebuttal, when the evidence was only competent in chief, and on the further ground that the name of the witness was not indorsed on the indictment, nor was defendant notified that the witness would be called to testify. The court may, in its discretion, allow evidence on rebuttal which strictly should have been offered in chief. It has frequently been held not to be error to allow a witness to testify whose name is not on the indictment, and where no notice has been given that the witness would be called. It is a matter resting in the sound discretion of the court. *Bulliner v. The People*, 95 Ill. 394.

It is also claimed that improper remarks were made by the State's attorney in his opening statement of the case to the jury, and also that counsel assisting the State's attorney used certain improper language in his closing argument to the jury. Without repeating what was said, we find nothing in the remarks of counsel not warranted by facts in the case.

It is also contended that the court erred in refusing defendant's first, second, third, fourth, fifth, sixth, seventh and eleventh instructions. None of the instructions given or refused are set out in the abstract. Upon referring to the transcript of the record, however, we find that the court gave for defendant thirty-five instructions and refused eleven. As none of the instructions are numbered as they appear in the record, it is difficult to determine which refused instructions defendant's counsel insist should be given. But be that as it may, the instructions given for defendant contain all the law necessary to be given to the jury to enable them to pass on the guilt or innocence of the defendant. There was therefore no necessity for giving any of the instructions which the court refused.

But it is said the evidence was insufficient to establish the guilt of the defendant. Upon this branch of the case but

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Opinion of the Court.

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little need be said. It is beyond question that Susie Hoover was pregnant at the time of her death. The *post mortem* demonstrated that fact. That the defendant was her seducer and the cause of her ruin was fully established by his own letters read in evidence before the jury. There is abundance of evidence that he had agreed to marry this unfortunate girl. Indeed, it was admitted in his evidence. On Thursday, October 13, one week before the death of the deceased, the defendant, in the presence of the Halloways, agreed upon the time and place of the marriage, October 20, at their residence in Farmer City. The condition of the deceased had become known to her sister, Mrs. Banks, and the defendant knew and realized that her condition could not be concealed from others. Immediate action of some kind was required. If the defendant desired to marry the girl, she was of age, and he could have done so at any time, regardless of any objections from her father or any member of the family. But it is apparent, from the evidence, that he did not intend to marry her. After returning with her from Farmer City, when the day of the marriage was fixed, he saw the deceased but once, and that was only for a short time at Arrowsmith's, on Sunday, until he appeared at Banks' place on Thursday, the 20th, the day they had agreed upon to be at Halloway's and have the marriage take place. When he came to Banks' on Thursday forenoon, he did not come there for the purpose of carrying out his engagement of the week before. This is manifest from his conduct. On Wednesday the defendant was at Bloomington, and learned that the father of the deceased would leave that evening for Missouri. He then started at once for Ellsworth, and the next day, about noon, arrived at Banks'. Upon his arrival he at once went to the room he had occupied, and packed and strapped his trunk. Up to this time he had no conversation with the deceased. He then went down stairs, and the family sat down to the dinner table. He declined to eat. After dinner was over, a conversation in whisper is had

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Opinion of the Court.

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between defendant and Susie. He then went up-stairs, and she soon followed him to the room he had occupied. The two were in that room alone from five to ten minutes, and while there the sick sister across the hall heard them scuffling and Susie crying. She also heard the remark, "Don't, Jake!" three times in succession. Doubtless that was the time the deceased was induced by the defendant to take the fatal dose, which she declared in her dying statement the defendant had given her to bring on her monthly sickness. Immediately after this occurrence the defendant left, and within thirty minutes the deceased was in convulsions, which soon resulted in her death. From the evidence it is beyond question that the death of Susie Hoover was caused by strychnine poison, and the evidence all points to the defendant as the person who caused her to take it.

The anxiety and uneasiness manifested by the defendant after leaving the Banks place, during the entire afternoon, until he heard of the death of Susie Hoover, are inconsistent with his innocence. When Banks left defendant at the depot at Ellsworth, defendant said, "If anything happens to Susie or Anna let me know." He had left a niece, Miss Willoughby, at the same place, but he felt no anxiety in regard to her,—it was the Hoovers who were weighing on his mind. About three o'clock that afternoon, Mr. Bone, a neighbor, came in after a doctor, and the defendant inquired of him what was wrong at Banks'. Bone said he supposed Anna was worse. The defendant then said if anything happened to Hoover's girls to let him know,—Susie Hoover especially. About one hour later the defendant called at the doctor's residence and inquired, "Did the doctor go out there?" Again, the same afternoon he inquired of a party at the post-office in reference to the Banks, and about six o'clock he met a young lady who made her home there, but who had been away since morning, and asked her who was sick at Millard Banks'. She told him Anna. He replied there must be some one else sick. The



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Opinion of the Court.

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doctor had then returned, and defendant went to him with the same inquiry, but receiving no satisfactory answer he returned to the young lady, and met a man named Reed, who informed him that Susie Hoover was dead. Why all this anxiety and inquiry, unless he knew that Susie Hoover had taken something which might endanger her life?

It appears from the record that a chemical analysis of the stomach was made about three months after the death of the deceased, and no detectable quantity of strychnine was found, and some importance is attached to this fact in the argument. From an examination of the evidence it will be found that, as a general rule, when death is produced from strychnine poison, traces of the poison may be detected in the stomach. But such is not always the case. Where a dose is given which is only sufficient to produce death, and death ensues, no trace of the strychnine will be found in the stomach. The reason for this, as disclosed by the evidence, is, where the exact amount of poison is given to produce death the poison will be destroyed in doing its work; it will be absorbed and eliminated; it will change its relation so it can not be detected. From a half grain to two grains of strychnine is ordinarily regarded as sufficient to produce death. Here, if the defendant gave to the deceased what might be termed an exact fatal dose, no portion of that taken would be found in the stomach, for the obvious reason it was all taken up by the blood and carried to the nerve centers, where it produced its fatal work. Moreover, one-fifth of a grain may remain in a full stomach and it can not be detected by the most scientific test that may be resorted to. There may be other exceptions to the general rule. The fact, therefore, that the chemist in this case failed to detect traces of poison does not overcome the undisputed evidence in the case that the deceased came to her death from strychnine poison.

We perceive no reason for disturbing the judgment of the circuit court, and it will be affirmed. *Judgment affirmed.*

## Syllabus.

HERVEY LIGHTNER

v.

THE CITY OF PEORIA.

*Filed at Ottawa March 31, 1894.*

1. **SPECIAL ASSESSMENT—SPECIAL TAXATION—*difference*.** Municipal authorities may require the special benefits accruing from a local public improvement to be assessed upon the property thus specially benefited, or may impose the same by way of special taxation, the two modes differing only in the manner of ascertaining the benefits.

2. **SAME—*when authorized*.** Special assessments and special taxes imposed for local improvements, unlike general taxes, are based upon benefits to the property against which they are assessed and levied, arising from its increased value in consequence of the improvement. They are authorized only when the local improvement, either actually or presumptively, benefits the particular property in an amount equal to the burden imposed. The liability for such tax is confined to the property benefited.

3. **SPECIAL TAXATION—*uniformity—taxing district*.** The effect of an ordinance providing for a local improvement by special taxation is to create a taxing district composed of the property contiguous to the improvement. It lies at the foundation of the right to impose the taxes that they should be levied for a public purpose, and laid according to some fixed rule of apportionment, so that practical uniformity may be arrived at in their imposition upon persons or property within the taxing district, whether that district be the State, county, etc., or a district thereof created by ordinance for local improvement.

4. **SAME—*unequal benefits—dividing the improvement*.** Where an improvement of an entire street benefits the contiguous property, upon different parts of it, in unequal proportions, the city council, in the exercise of their discretion, may divide the improvement, so as to secure practical uniformity in the distribution of the burden. The tax should be so levied, and such system of apportionment adopted, that the property subject to the tax will bear its just proportion of the burden in proportion to the benefits arising from the improvement.

5. And where a difference exists, not only in the nature, extent and cost of the improvement, but also in the benefits accruing to contiguous property upon different parts of the same improvement, the tax should be so levied that the burden will be borne in proportion to the benefits secured. But a mere arbitrary breaking up of the improve-

150	80
150	531
152	117
152	170
153	652
154	163

150	80
165	152
165	614
167	341
150	80
176	506

150	80
187	*413

150	80
204	*465

80:35 LRA

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Syllabus.

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ment into sections, having a tendency to produce unequal distribution of the tax, can not be sustained.

6. *SAME—equal benefits—how determined.* The imposition of a special tax is of itself a determination by the legislative authority of the city that the benefit to contiguous property will be as great as the burdens imposed. By the statute, cities and villages are expressly authorized to determine that the improvement shall be made and paid for by special taxation of contiguous property, and in the absence of an abuse of their discretion the courts can not interfere.

7. *SAME—according to frontage.* After municipal authorities have determined upon the width, character and kind of improvement to be made, and that it shall be paid for by special taxation according to frontage, it is their duty to so levy it as that equality in the imposition of the burden, so far as practicable, should be attained.

8. *SAME—collecting tax in installments.* An assessment of a special tax will not be rendered void because the ordinance provides for the tax to be collected in installments, as it is provided special assessments for local improvement may be paid by the act of the legislature in force July 1, 1891. It is competent for city authorities to provide, by ordinance, for the payment of special taxes by installments.

9. *SAME—taxing district—what it comprises.* A taxing district created by ordinance, for the purpose of making a local improvement by special taxation, comprises all the property contiguous to the improvement subject to special taxation for making the same. A public street or alley is not contiguous property, within the sense of the statute, and therefore is not subject to special taxation.

10. *SAME—taxation of streets.* The fee of the streets of a city being vested in the city for the use of the general public, they are not the subject of taxation, and no sale of the streets can be made to satisfy a special tax, if assessed on them.

11. *SAME—for paving a street—exclusion of street railway.* In a proceeding by a city to improve and pave a street by special taxation, the exclusion of the rights of way held by street railway companies from the pavement, etc., will not invalidate the ordinance.

12. *SAME—taxation of street railway—according to frontage.* It can not be said that a railway right of way has a frontage upon the street, as that term is applied to abutting property, and while it is to be treated as contiguous property, and be required to contribute to the burden of local improvements, some apportionment of the tax must be adopted other than by frontage.

13. *STREET RAILWAY—paving street—discretion of municipal authorities.* Whether a street railway company shall pay for paving between its tracks, as is sometimes done, or more or less, or whether the levy

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Statement of the case.

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shall be of a share or portion of the whole cost, and if so, how much, rests in the discretion of the municipal authorities, to be reasonably exercised. In the absence of anything showing to the contrary, it must be presumed that the municipal authorities have exercised their discretion reasonably, and required of the railway companies payment of their just and equal proportion of the cost of the local improvement.

APPEAL from the County Court of Peoria county; the Hon. SAMUEL D. WEAD, Judge, presiding.

At the May term, 1892, of the county court of Peoria county, upon petition of the city of Peoria for confirmation of a special assessment for the improvement of that part of Main street, in said city, lying between the upper line of Water street and the upper line of Bluff street, a decree was entered confirming such assessment. It appears that on February 2, 1892, the city council of Peoria passed an ordinance for the curbing and paving of that part of Main street, particularly specifying the location, nature, character and description of the improvement, and providing that the cost thereof, including street and alley intersections, be paid by special taxation upon contiguous property, according to frontage; that said assessment be collected by installments, in accordance with the act of 1891, amendatory of the Cities and Villages act, approved June 15, 1891, etc., and appointing commissioners to ascertain and report the cost of such improvement. The commissioners appointed made report thereof, which was approved by the city council, and the petition to the county court ordered filed. In the county court commissioners were appointed to levy the reported cost of the improvement upon contiguous property, who, after taking the oath prescribed by the statute, duly made and returned an assessment roll. Appellant and others filed objections to the confirmation of the assessment, which were overruled, and an order confirming the assessment entered, from which objectors appeal. Other facts necessary to an understanding of the case are stated in the opinion.

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Opinion of the Court.

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MESSRS. JACK & TICHENOR, for the appellant.

MR. JOHN W. CULBERTSON, City Attorney, and Mr. W. T. WHITING, for the appellee.

MR. JUSTICE SHOPE delivered the opinion of the Court:

This is an appeal from the judgment of the county court of Peoria county, confirming the assessment of special taxes upon contiguous property, levied and assessed for the curbing and paving of Main street, in the city of Peoria, from the upper line of Water street to the upper line of Bluff street, in said city. Main street is one hundred feet wide. For a portion of the distance ordered improved by this ordinance, the center of the street is occupied by double street railway tracks, for another portion, by a single street railway track, while still other parts are not so occupied, and at certain street intersections street railway tracks cross Main street. By the ordinance the rights of way of the several railway companies on and crossing Main street are expressly excepted out of the improvement required by the ordinance to be made, the cost whereof is to be assessed upon contiguous property, and the assessment, it is conceded, was so made. It is stated, and not controverted, that by the ordinances of the city granting the franchises to the railway companies, they are required to pave, etc., their rights of way.

That the right of way of the railways in the street proposed to be improved is contiguous property, and falls within the designation of property that may be specially taxed, was held in *Kuehner v. Freeport*, 143 Ill. 92. In this case it may fairly be presumed that the street railways were required to pave their rights of way. The exclusion of such rights of way from the pavement, etc., to be paid for by special taxation of contiguous lots, blocks and tracts of land, has been so frequently held not to invalidate the ordinance that it can no longer be considered an open question. *Enos v. Springfield*, 113 Ill.

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Opinion of the Court.

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65; *Wilbur v. Springfield*, 123 id. 395; *Green et al. v. Springfield*, 130 id. 515; *Kuehner v. Freeport*, *supra*.

It can not be said that the railway right of way has a frontage upon the street, as that term is applied to abutting property, and while it is to be treated as contiguous property, and be required to contribute to the burthen of local improvements, some apportionment of the tax upon it must be adopted other than by frontage. In *Kuehner v. Freeport*, *supra*, it was said: "Whether the railway shall pay for paving between its tracks, as is sometimes done, or more or less, or whether the levy shall be of a share or portion of the whole cost, and if so, how much, rests in the discretion of the municipal authorities, to be reasonably exercised." By reference to the cases cited it will be seen that the levy of a special tax to pay for the improvement, not included within the right of way, and excluding it from the levy upon abutting property, has uniformly been sustained. In the absence of anything showing to the contrary, it must be presumed that the municipal authority has exercised its discretion reasonably, and required of the railway companies payment of their just and equal proportion of the cost of the local improvement.

It is objected that the assessment is void, for the reason that the ordinance provides for the tax to be collected in installments, as it is provided special assessments for local improvements may be paid, by the act of the legislature in force July 1, 1891, (3 Starr & Curtis, par. 170 a, p. 208,) that act applying to special assessments, as it is said, and not to special taxes levied for local improvements. The act of 1872, entitled "An act to provide for the incorporation of cities and villages," invests corporate authorities of cities and villages with power to make local improvements by special assessment or special taxation. Section 2, article 9, requires that the ordinance providing for making the improvement shall prescribe whether the same shall be made by special assessment or by special taxation of contiguous property, or general taxa-

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Opinion of the Court.

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tion, or both. Section 17 provides, that when the ordinance prescribes that the improvement shall be made by special taxation of contiguous property, "the same shall be levied, assessed and collected in the way provided in the sections of this act providing for the mode of making, levying, assessing and collecting special assessments." By an act of the legislature approved and in force April 24, 1887, (Laws of 1887, p. 104,) article 9 of the Cities and Villages act of 1872 was amended by adding thereto certain sections, being from 55 to 67, inclusive. Section 55 provided for the division of special assessments for local improvements in cities and villages into installments, and prescribing the mode for such division and payment of the installments. The other sections are unimportant to be considered here. Thereby section 55, and the subsequent sections, became incorporated into and formed part of said article 9, prescribing "the mode of making, levying, assessing and collecting special assessments." Thereafter the mode of levying, assessing and collecting special assessments, if so prescribed in the ordinance, might be by dividing them into installments, and payable as provided in said section 55. The act of 1891 is an amendment of said section 55 of article 9, as amended in 1887, and July 1, 1891, became a part of said article 9, providing for the mode of making, levying and collecting special assessments for local improvements, by their division into installments. By virtue of the provisions of section 17, before quoted, said act became applicable to special taxation of contiguous property for local improvements. The same rule has been announced in *English v. City of Danville*, post, p. 92. We are of opinion that it was competent for the municipal authorities to provide by ordinance, as they have done, for the payment of the special taxes assessed, in installments.

The ordinance provides, in the improvement contemplated, that the curbing on each side of the street shall be set twenty feet from the lot line, curving at street intersections out to the

## Opinion of the Court.

line of the street, thereby, except at intersections of streets, requiring a roadway to be paved sixty feet wide, less railway rights of way, and at such intersections extending the pavement the full width of Main street, or one hundred feet. It is objected that the city was without power to assess the whole cost of the improvement upon the contiguous property, but should have assessed a *pro rata* share of the tax upon the streets and alleys intersecting Main street, treating such streets and alleys as contiguous property. The contention is without merit. By the ordinance a taxing district was created, in which the benefits flowing from the proposed improvement were found by the legislative authority of the city to diffuse themselves in equal proportions upon the property within the district liable to taxation. The district comprised all of the property contiguous to the improvement, subject to special taxation for making the same. (*Davis v. Litchfield*, 145 Ill. 313, and authorities cited.) Within the district thus created it was competent for the city authorities to assess a special tax to defray the cost of such improvement, and as said in *Craw v. Village of Tolono*, 96 Ill. 256, "the imposition of the tax is, of itself," (in the absence of a clear abuse of the legislative discretion of the municipality,—*Bloomington v. Chicago and Alton Railroad Co.* 134 Ill. 452,) "a determination that the benefits to the contiguous property will be as great as the burden imposed." (*White v. The People*, 94 Ill. 607; *Enos v. Springfield*, *supra*; *Davis v. Litchfield*, *supra*.) Special assessments and special taxes imposed for local improvements, unlike general taxes, are based upon benefits to the property against and upon which they are assessed and levied, arising from its increased value in consequence of the improvement. They proceed upon the basis of benefits to the particular property, and are authorized only when the local improvement, either actually or presumptively, benefits the particular property in an amount equal to the burden imposed. The levy being upon the basis of benefits accruing to the specific prop-



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Opinion of the Court.

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erty, it becomes a charge only upon and against it, and liability for the tax is confined to that particular property. *Craw v. Village of Tolono, supra; McLean County v. City of Bloomington*, 106 Ill. 209.

The fee of the streets of the city is vested in the municipality in trust for the use of the general public, and they are not therefore the subject of taxation. (*McLean County v. City of Bloomington, supra.*) No sale of the streets could be made to satisfy the special tax, if assessed upon them, (*Taylor v. The People ex rel.* 66 Ill. 322,) and it follows, necessarily, that they are not contiguous property, within the meaning of the statute, and subject to local taxation. Again, as already seen, special taxation and special assessment are based upon the idea, real or presumptive, that the property assessed is increased in its market value by reason of the improvement. Without elaborating, it is apparent that there can be no such increased value to the streets of the city. They are avenues and ways, established and maintained for the convenience and benefit of the property holders and the public, and while they may increase the value of property in the locality or throughout the municipality, they are not the subject of property in the ordinary sense, and are not, in themselves, increased in value by their own betterment.

It is, however, urged, that it was unjust to the contiguous lot owners to assess the entire cost of the improvement, including the intersections, upon the contiguous property. Addressed to the city council, this position would seem to be entitled to grave consideration. As already seen, the imposition of the tax is, of itself, a determination by the legislative authority of the city that the benefits to the contiguous property will be as great as the burden imposed. There is necessarily vested in the city council a large discretion in determining the extent of the improvement, what shall be included within it, and the nature and character of it. By the statute they are expressly authorized to determine that the

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Opinion of the Court.

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improvement shall be made and paid for by special taxation of contiguous property, and unless there has been a clear abuse of the power and discretion conferred upon the city council, courts are powerless to interfere. There is nothing in the record showing, or tending to show, an abuse of discretion on the part of the city council. True, they require the expense of paving the street intersections to be paid by special taxation of the contiguous property; but the paving of the intersections is necessary to the continuity of the improvement and to the benefit derived therefrom by the contiguous property, and if, as must be presumed, the benefit to the contiguous property is equal to the cost of the entire improvement, including the street intersections, there is no impropriety or injustice in the imposition of the tax. Ordinarily, perhaps, the paving of the street intersections, presumably being *pro tanto* an improvement of intersecting streets, has been paid for out of the general revenues of the municipality. But such intersecting streets may not require paving, or if requiring it may never be paved, and while there may be resulting benefits from the improvement, diffused, to the same extent, to sub-adjacent property, the special benefit contemplated and authorizing the special tax will accrue to the property contiguous to the street improved. It follows, necessarily, that the municipal authorities may require the special benefits accruing from the improvement to be assessed upon the property thus specially benefited, or may impose the same by way of special taxation, the two modes differing only in the manner of ascertaining the benefits. *Craw v. Tolono*, and cases *supra*.

Upon the hearing of objections, appellants offered in evidence four additional ordinances, passed at the same time as the one providing for the improvement under consideration, and the proceedings thereunder, by which it was shown that Main street was to be curbed and paved from the upper line of Water street to Bradley street, at the extreme western limit

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Opinion of the Court.

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of the city, a distance of over a mile. The various ordinances offered showed the creation of five separate taxing districts, and it is insisted that the curbing and paving were a single improvement, and that it was not competent for the city to divide it up in the manner proposed. By the ordinance, in this case, Main street was to be improved from the upper line of Water street to the upper line of Bluff street, and without entering into the nature and character of the improvement farther than has been already done, it was shown that the cost of the improvement per front foot, between said points, was \$9.20. The next section of the improvement provided for by the first ordinance introduced in evidence by appellants, was from the upper line of Bluff street to the upper line of Crescent avenue, and the cost thereof was shown to be \$7.80 per front foot. The next division was from the upper line of Crescent avenue to the lower line of North street. In this section the roadway of Main street was to be improved of the width of forty feet, and the cost per front foot was shown to be \$3.45. The next section or division of the street was from the lower line of North street to the west side of Elizabeth street, and the remaining division was from the west side of Elizabeth street to Bradley street, the cost of the former being \$3.85 per front foot and the latter \$5.37 per front foot, the roadway through the last two sections being of the width of thirty-six feet, and there being a variation in the depth of excavation beneath the surface and the thickness of the concrete base upon which the brick pavement was to be laid.

As we have already seen, the extent of the improvement, and the nature and character of it, necessarily rest within the legislative discretion of the city council. (*Davis v. Litchfield, supra*; *Louisville and Nashville Railroad Co. v. East St. Louis*, 134 Ill. 663; *Dillon on Mun. Corp.* secs. 58, 59.) The effect of an ordinance providing for a local improvement by special taxation is to create a taxing district, composed of the property contiguous to the improvement. It lays at the founda-

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Opinion of the Court.

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tion of the right to impose the taxes, that they should be levied for a public purpose, and laid according to some fixed rule of apportionment, so that practical uniformity may be arrived at in their imposition upon persons or property within the taxing district, whether that district be the State, county, municipality, or a district thereof created by ordinance for local improvement. (1 *Desty on Taxation*, 29; *Dillon on Mun. Corp.* 587.) The municipal authorities having determined upon the width, character and kind of improvement to be made, and that the same should be paid for by special taxation, according to frontage, it was their duty to so levy it as that equality in the imposition of the burden, as far as practicable, should be attained. "Equality," says Mr. Desty, "as far as practicable, and security of property against irresponsible power, are principles which underlie the power of taxation, as declared ends and principles of fundamental laws."

We have repeatedly held, that where the improvement of even a number of streets would diffuse their benefits with practical equality on property contiguous to each, they may be combined in a single scheme of improvement, and no reason is apparent why, where an improvement of an entire street benefits the contiguous property, upon different parts of it, in unequal proportions, the city council, in the exercise of their discretion, may not divide the improvement, so as to secure practical uniformity in the distribution of the burden. Absolute equality in the imposition of the tax is not attainable, but in all cases the tax should be so levied, and such system of apportionment adopted, that the property subject to the tax, as far as practicable, will bear its just proportion of the burthen in proportion to the benefits arising from the improvement; and where a difference exists, not only in the nature, extent and cost of the improvement, but also in the benefits accruing to contiguous property upon different parts of the same improvement, the very plainest principles of justice would seem to require that the tax be so levied that the bur-

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Opinion of the Court.

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den will be borne in proportion to the benefits received. It requires no evidence or argument to show that an improvement of a street through the business center of the city, requiring greater width and solidity of pavement, would bear little proportion, in the benefits conferred, to the benefits accruing to residence property situated upon the outskirts of the city, and it would undoubtedly be true that the disproportion would arise proportionately as the improvement receded from the business center. It is manifest that in this case, unlike *Davis v. Litchfield, supra*, where there was an attempted arbitrary imposition of the cost of the improvement in front of each lot contiguous to the street, there was here an endeavor to so organize the taxing district that there should be an equal distribution of the tax upon property in different sections of the city, in proportion to the benefits accruing. This, we think, was within the legislative discretion of the city council, and if made by them in the reasonable exercise of such discretion their action is final. (Cooley on Taxation, 110, *et seq.*; *Davis v. Litchfield, supra*.) This record fails to show any such abuse in the exercise of the power conferred as to authorize the court to declare the ordinances void. Undoubtedly a mere arbitrary breaking up of the improvement into sections, having a tendency to produce unequal distribution of the tax, could not be sustained. But no such case is here shown.

Other objections are made, which we have carefully considered, but which, in view of the legislative discretion vested in the city council in determining the nature, character, extent and description of the improvement, will require no special consideration.

Finding no substantial error in this record, the judgment of the county court will be affirmed.

*Judgment affirmed.*

## Syllabus. Opinion of the Court.

CHARLES L. ENGLISH

v.

THE CITY OF DANVILLE.

*Filed at Springfield April 2, 1894.*

1. **LOCAL IMPROVEMENTS**—*discretion of municipal authorities.* In the passage of an ordinance providing for a local improvement, the city council is clothed with power to determine what improvement is required, its nature and character, when it shall be made, and the manner of its construction. These are matters resting in the discretion of the city council, and that discretion, when honestly and reasonably exercised, can not be reviewed by the courts.

2. **CITIES AND VILLAGES ACT**—*amendments—article 9.* The sections of the act of April 29, 1887, relating to cities and villages, were passed to amend article 9 of the general Incorporation act, and became a part of it. By the act of June 15, 1891, sections 55 and 63 of the act of 1887 were amended, and the act of 1893 is to be regarded as an amendment to the act of 1887, as amended by the act of 1891, as it relates to the same subject matter, and, in effect, changes the sections of the act of 1887 relating to the collection of special assessments.

3. The mere fact that the act of 1893 does not, in its title, profess to amend article 9 of the Cities and Villages act, is unimportant. If the later act made a change in the mode of procedure, it may be regarded as an amendment to the other act, and the act of 1893 includes special taxes as well as special assessments, which may be made payable in installments.

APPEAL from the County Court of Vermilion county; the Hon. JOHN G. THOMPSON, Judge, presiding.

Messrs. KIMBROUGH & MEEKS, for the appellant.

Mr. G. F. REARICK, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This is an appeal from the county court of Vermilion county, from its order confirming an assessment of special taxes levied for the paving of Vermilion street, in said city, from English to Voorhees street. The ordinance provides that the paving

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160 556  
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166 489

150 92  
168 159

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150 92  
195 1 23

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Opinion of the Court.

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of street and alley intersections shall be paid for by general taxation, and that the right of way of a street railway having its track therein shall be paved by the company, and that the remainder of the cost shall be paid by a special tax levied upon property abutting on the line of said improvement, on both sides, in proportion to frontage.

Section 14 of the ordinance provided: "All owners and occupants of real estate touching or abutting upon said street, along the line of said improvement, are hereby required to make all contemplated private connections with public sewers, water mains or gas mains in said street before the work of laying any pavement thereon is commenced. The city clerk shall, without delay, prepare suitable notices, and cause the same to be served by the street superintendent, or some member of the police force, upon all property owners along the line of said improvement."

Section 6 of the ordinance, as originally adopted, provided for the collection of the taxes in five installments, but after the act of June 17, 1893, went into force, section 6 was amended to read as follows:

"Sec. 6. That the special taxes herein ordered levied and assessed shall be collected in seven installments, the first of which installments shall include all fractional amounts, leaving each of the remaining installments equal in amount and multiples of one hundred dollars. Said first installment shall be due and payable on and after confirmation thereof, and the second installment one year thereafter, and so on until all are paid,—which said assessment and installments shall bear interest at the rate of six (6) per cent per annum from and after thirty (30) days succeeding the day of confirmation of the assessment roll herein. And for the purpose of anticipating the collection of the second and succeeding installments aforesaid, bonds shall be issued, payable out of said installments, bearing interest at the rate of six (6) per centum per annum, payable annually, and signed by the mayor and city clerk, and

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Opinion of the Court.

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attested by the corporate seal of said city of Danville. Said bonds shall be each in the sum of \$100, and shall not be dated and issued until ninety days after the said installments begin to draw interest. Said bonds shall have interest coupons attached, and shall in all respects conform to the provisions of the statute in such case made and provided."

The appellant interposed two objections in the county court to the confirmation of the tax, which are relied upon here: First, that the law does not warrant the division of the assessment into seven installments, nor does it warrant the issue of improvement bonds to anticipate their collection; and second, that the ordinance is arbitrary, in that the pavement will be laid in advance of necessary water mains, to lay which the street pavement will afterward have to be torn up.

Article 9 of the act to provide for the incorporation of cities and villages, as originally enacted in 1872, contained no provision for the collection of special assessments or special taxes in installments, but on the 29th day of April, 1887, the legislature passed an act to amend article 9 by adding thereto thirteen sections, numbered from 55 to 67, inclusive. (Laws of 1887, p. 104.) These sections made provision for a division of a special assessment, and for the collection thereof in installments. On the 15th day of June, 1891, sections 55 and 63 of the act of 1887 were amended, (Laws of 1891, p. 81,) and as amended the law provided for the collection of special assessments in five different installments. By the terms of the act of 1887 the sections of that act then adopted became a part of article 9, and, as we understand the argument, it is not questioned that the special tax in question might have been collected in five installments, had the proceedings followed and conformed to the act of 1887, as amended in 1891. But this proceeding was not under that act, but under the act of 1893. (Laws of 1893, p. 78.) The first section of the act provides, that "whenever the corporate authorities of any city, town or village have heretofore levied or shall hereafter



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Opinion of the Court.

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levy any special assessments pursuant to law, it shall be lawful for such corporate authorities, at any time prior to the commencing the collection thereof, to provide, by ordinance, that said assessment shall be divided into installments, not more than seven in number, the first of which \* \* \* shall be due and payable on and after confirmation thereof, and the second one year thereafter, and so on until all are paid." The section also provides that the installments shall bear interest. The second section provides for issuing bonds.

This act does not mention special taxes, but only special assessments, and it is insisted that the act embraces nothing but a special assessment. The title of the act is as follows: "An act to authorize the division of special assessments, in cities, towns and villages, into installments, and authorizing the issue of bonds to anticipate the collection of the deferred installments." The act does not, on its face, profess to amend article 9, or any section thereof, but, upon its face, it appears to be an independent act. But after a careful consideration of the act we are inclined to hold that it should be regarded as an amendment to the act of 1887, as amended by the act of 1891. It relates to the same subject matter, and, in effect, changes the sections of the act of 1887 relating to the collection of special assessments in installments, providing for seven installments where the old act only provided for five, and it contains a provision for the issue of bonds to supersede the issue of vouchers provided for under the old act. The mere fact that the act does not, in its title, profess to amend article 9, is unimportant. If the later act made a change in the mode of procedure, the later act may be regarded as an amendment to the other. (*The People v. Wright*, 70 Ill. 388.) If, therefore, the act of 1893 was an amendment to the sections of the act of 1887 which were a part of article 9, it is plain that the act of 1893, under which the assessment was made, was also a part of article 9, and if the act of 1893 was an amendment of article 9 and a part thereof, it is clear the

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Opinion of the Court.

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act included special taxes as well as special assessments. Section 17 of article 9 declares: "When said ordinance under which said local improvement shall be ordered, shall provide that such improvement shall be made by special taxation of contiguous property, the same shall be levied, assessed and collected in the way provided in the sections of this act providing for the mode of making, levying, assessing and collecting special assessments." The act of 1893 provided a certain mode for the collection of special assessments,—by installments; and under section 17, *supra*, special taxes may be collected in the same manner. The first objection, therefore, interposed to the confirmation of the special tax, was properly overruled.

As respects the second objection but little need be said. Article 9 of the statute entitled "Cities, Villages and Towns," confers the power upon the corporate authorities of cities and villages to make local improvements by special assessment, or by special taxation, or both, of contiguous property, or general taxation, as they shall, by ordinance, prescribe. In the passage of an ordinance providing for a local improvement the city council is clothed with power to determine what local improvement is required, its nature and character, when it shall be made, and the manner of its construction. These are matters resting in the discretion of the city council, and that discretion, when honestly and reasonably exercised, can not be reviewed in the courts. (*Dunham v. Village of Hyde Park*, 75 Ill. 371; *Fagan v. City of Chicago*, 84 id. 231.) All ordinances must be reasonable, and not unfair or oppressive on the citizen. But the ordinance in question is not liable to either of these objections. Perhaps it might be well, in all cases where a street is being paved, to have the water mains and street sewers constructed before the pavement is made. But all such matters rest in the sound discretion of the city council.

The judgment will be affirmed.

*Judgment affirmed.*

## Syllabus.

## THE VILLAGE OF CLAYTON

v.

LOUISA W. BROOKS.

Filed at Springfield April 2, 1894.

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59a 545  
58a 877150 97  
65a 421150 97  
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1. **NEGLIGENCE**—*what constitutes contributory negligence.* Contributory negligence is nothing more or less than negligence on the part of the plaintiff, and the rules of law applicable to negligence in a defendant are applicable thereto. In general, the question of negligence is one of fact. Hence an instruction is properly refused which tells the jury, as a matter of law, that certain facts *per se* constitute negligence. Knowledge of a defect in a sidewalk by a person injured, before he goes upon the same, or before the injury, does not *per se* establish negligence on his part.

2. While one may voluntarily and unnecessarily expose himself or his property to danger without thereby becoming guilty of contributory negligence, as a matter of law, yet it is an established rule that when one does knowingly put himself or his property in danger there is a presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such a course of conduct. But knowledge in this respect does not necessarily constitute contributory negligence. One may exercise due care with full knowledge of the danger to which he is exposed or to which he may lawfully expose himself.

3. The mere fact that a traveler is familiar with a road or sidewalk, and knows of a defect therein, will not impose on him the duty to exercise more than ordinary care in avoiding it. Such knowledge is a circumstance, but it should be submitted, with the other facts of the case, to a jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury. But the mere fact that the obstructed or defective street was out of the way of the point at which the traveler was arriving, or that he might have taken a nearer way, is immaterial, as it is the duty of the town to repair all of its sidewalks.

4. **SAME**—*notice of danger—evidence of negligence.* The exposure of person or property to injury with knowledge of the danger to which the same is exposed, is evidence of negligence, as a matter of fact. Therefore, if a person attempts to pass over a sidewalk, bridge or other structure, knowing the same to be in a dangerous condition, and in such attempt receives injury, his knowledge of the danger will presumptively establish contributory negligence. But such presumption

## Brief for the Appellant.

is not conclusive. It may be rebutted by evidence of the exercise of ordinary care under the circumstances of the particular case.

5. Contributory negligence is not shown by proof that after knowing the condition of the street the plaintiff traveled on it after dark; and the fact that a traveler on a highway perceives that an obstacle therein is dangerous to persons attempting to pass it, is not conclusive that he does not use due care in making the attempt. Nor does the mere fact that the plaintiff might have taken better and safer sidewalks than the one he did take, charge him with want of ordinary care.

6. In an action against a village for a personal injury resulting from a hole in a sidewalk, one of the ultimate facts for the jury is, was the plaintiff guilty of contributory negligence. And the fact that he or she returned home in the night time over the defective sidewalk, with knowledge of its unsafe condition, is a circumstance proper to be shown, as tending to establish such negligence. It is an evidentiary fact proper to go to the jury, as having a tendency to prove the ultimate fact in question.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. WILLIAM MARSH, Judge, presiding.

Mr. WILLIAM McFADON, for the appellant:

The appellee was herself guilty of and brought the injury upon herself by her own contributory negligence, for it is apparent that by the exercise of ordinary care she could have gone around the hole without leaving the sidewalk, or had she provided herself with a light, she could have stepped over it or gone around it. *Indianapolis v. Cook*, 99 Ind. 13; *Schaefer v. Sandusky*, 33 Ohio St. 249; *Barnum v. Concord*, 2 N. H. 392; *Barker v. Covington*, 69 id. 36; *Fulsom v. Underhill*, 36 Vt. 531; *Earrille v. Carter*, 6 Bradw. 422; *Aurora v. Brown*, 12 id. 130; *Chicago v. Bixby*, 84 Ill. 82; *Centralia v. Krouse*, 64 id. 19; *Mt. Vernon v. Dusencliett*, 2 Carter, 587.

Appellee was not in the exercise of that degree of care which she must show as a condition precedent to a recovery. *Aurora v. Brown*, *supra*; *Momence v. Kendall*, 14 Bradw. 232; *Railroad Co. v. Green*, 81 Ill. 20; *Railroad Co. v. Becker*, 76 id. 27.

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Brief for the Appellant.

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If the plaintiff, knowing, as she did, the existence of the defects in the walk, and that the walk was thereby made dangerous, chose to pass over it late at night, and when it was so dark that she could not see holes in it, she took the risk upon herself, and can not recover for her injury in so doing. *Farnum v. Concord*, 2 N. H. 292; *Horton v. Ipswich*, 12 Cush. 488; *Wilson v. Charleston*, 8 Allen, 138; *Barker v. Covington*, 69 Ind. 36; *Indianapolis v. Cook*, 99 id. 13.

In view of the fact that the defect in the sidewalk was a visible one, and that the plaintiff had long known the same, and could have reached her home by another sidewalk on another street said by witnesses to have been safe, the eleventh instruction given for plaintiff was erroneous, in telling the jury that if Jefferson street was a public street in Clayton, and that there was a sidewalk on such street maintained by the village for the use of persons on foot, the plaintiff had a right, at the time of the injury, to pass over said walk on foot, if only plaintiff was exercising ordinary care for her own safety in passing over the walk, and the defendant was guilty of negligence, as alleged in the declaration. *Lovenguth v. Bloomington*, 71 Ill. 240; *Centralia v. Krouse*, 64 id. 19; *Railway Co. v. Taylor*, 104 Pa. St. 314.

The instruction is also bad in utterly ignoring the question of whether appellee was negligent in entering upon the walk on which she was injured, and in permitting a recovery, if only, at the time of her injury, she was in the exercise of ordinary care for her own safety. *Railway Co. v. Clark*, 2 Bradw. 123, and cases cited; *Railroad Co. v. Weldon*, 52 Ill. 290; *Centralia v. Krouse*, 64 id. 19; *Horton v. Ipswich*, 12 Cush. 488; *Railway Co. v. Taylor*, 104 Pa. St. 314.

The defendant was only bound to keep its sidewalks in a reasonably safe condition for persons on foot using the same who were themselves in the exercise of ordinary care for their own safety. *Aurora v. Pulfer*, 56 Ill. 276; *Chicago v. McGiven*,

## Brief for the Appellee.

78 id. 347; *Chicago v. Bizby*, 84 id. 82; *Peoria v. Simpson*, 110 id. 294.

It is a well-defined principle of law, that where there is danger, and the peril is known, a man can not be regarded as exercising ordinary care if he encounters it unnecessarily; and hence in this case, the question being, did the appellee unnecessarily encounter danger, the inquiry is as to the existence of other safe ways,—not the appellee's knowledge thereof. *Schaefer v. Sandusky*, 33 Ohio St. 249; *Filliam v. Muscatine*, 70 Iowa, 862; *Parkhill v. Brighton*, 61 id. 103; *McKentry v. Keokuk*, 66 id. 725; *Centralia v. Krouse*, 64 Ill. 23; *Momence v. Kendall*, 14 Bradw. 232; *President v. Carter*, 6 id. 41.

Mr. H. M. SWOPE, and Messrs. CARTER & GOVERT, for the appellee:

Appellee was not guilty of such negligence as would preclude a recovery simply because she went upon the sidewalk after she knew it was defective or dangerous. *Aurora v. Dale*, 90 Ill. 47; *Bloomington v. Chamberlain*, 104 id. 273; *Joliet v. Conway*, 17 Bradw. 577; *Ellis v. Peru*, 23 id. 35; *Lovenguth v. Bloomington*, 71 Ill. 240; *Osborne v. Detroit*, 32 Fed. Rep. 39.

Whether or not appellee was in the exercise of ordinary care for her own safety, under all the circumstances, is a question of fact for the jury. *Railroad Co. v. Hutchinson*, 120 Ill. 587; *Railroad Co. v. Bonifield*, 104 id. 225; *Chicago v. Keefe*, 114 id. 228; *Pennsylvania Co. v. Frana*, 112 id. 398; *Lovenguth v. Bloomington*, 71 id. 238; *Mechanicsburg v. Meredith*, 54 id. 84; *Pomfrey v. Village*, 104 N. Y. 459.

It was not appellee's absolute duty to get medical aid at once, but must use ordinary care, only. *Elgin v. Riordan*, 21 Bradw. 600; *Railway Co. v. Eddy*, 72 Ill. 140.

The fact that appellee did not go out into the street, and around the defective walk, does not show such a want of care on her part as to preclude a recovery. *Aurora v. Dale*, 90 Ill.

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Opinion of the Court.

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47; *Bloomington v. Chamberlain*, 104 id. 268; *Ellis v. Peru*, 23 Bradw. 35.

The question of contributory negligence is for the jury. *Frost v. Waltham*, 12 Allen, 85; *Rindge v. Colrain*, 11 Gray, 157; *Whitaker v. West Boylston*, 97 Mass. 273; *Pollard v. Woburn*, 104 id. 84; *Humphreys v. County*, 56 Pa. St. 204; *Weed v. Ballston Spa*, 66 N. Y. 329; *Wheeler v. Westport*, 30 Wis. 392.

PER CURIAM: On the night of July 22, 1886, between the hours of nine and ten o'clock, appellee, while returning to her home in the village of Clayton, and while passing over the sidewalk along Jefferson street, one of the streets of that village, stepped into a hole in the sidewalk, in consequence of which she fell and received severe personal injury. It appears from her testimony that she knew of the defect in the sidewalk three or four weeks before the accident, and that when she left the lodge building, where she had been for the evening, it was too dark to see or distinguish anything on the sidewalk,—that the night was a dark and cloudy one. There were no lights on the street or from adjacent buildings, or otherwise, at the place of the accident. The streets were dry. Appellee's nearest and most direct route from the lodge room to her residence was over this sidewalk. The hole in the walk was not a large one. She could have gone by another route in safety, which, however, was nearly two blocks farther. Appellee brought an action on the case against the village to recover damages, which it is claimed resulted from such injury. On the trial a verdict finding the defendant guilty, and assessing appellee's damages at \$4800, was rendered. The court required the appellee to remit the damage above \$2500, and rendered judgment for that sum. On appeal to the Appellate Court that judgment was affirmed, and the village, by its further appeal, brings the case to this court.

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Opinion of the Court.

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The affirmance of the judgment of the circuit court is a determination of all controverted questions of fact against appellant, and is conclusive upon us. The controlling controverted questions of fact were, whether appellant was guilty of negligence in permitting the sidewalk, at the place where the injury occurred, to be and remain out of repair, and whether appellee exercised ordinary care for her personal safety. We can, therefore, only consider the rulings of the trial court in respect of the instructions given, modified or refused, and the admissibility of evidence.

It was contended by the defendant that the plaintiff was guilty of such contributory negligence in passing over the walk on Jefferson street, with a knowledge of the defect therein, when by taking another walk, or going out into the street around the defect, she might have reached her destination by a safe route, though somewhat longer, as would preclude a recovery by her. Upon this point several instructions are asked on both sides, the propriety of the ruling of the court in respect whereof is called in question.

By the eleventh instruction given at the instance of plaintiff, the jury were instructed, 'that if they believed, from the evidence, "that Jefferson street, in the village of Clayton, was a public street of said village, opened and used by the public as a public highway or street, and that there was on such street a sidewalk maintained by the village for the use of the public while traveling on foot, then the plaintiff had the right, at the time in question, to pass over said walk on foot, and the fact that she knew there was a defect in the sidewalk should not, of itself, deprive her of a right to recover in this case, if the jury believe, from the evidence, that the defendant is guilty as alleged in the declaration, and that plaintiff was, at the time, in the exercise of ordinary care and prudence for her own safety."

The court also gave for plaintiff an instruction marked "A," as follows :



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Opinion of the Court.

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"The court instructs the jury, that even if they believe, from the evidence, that there was at the time, on the 22d of July, 1886, a safer walk for the plaintiff to return to her home on other streets than the one taken by her, still, unless the jury believe, from the evidence, that the plaintiff, at the time, knew that such other walk on such other streets was a safer one than the one taken by her, then she was under no obligation to take such other walk to her home."

The defendant asked instruction numbered 12½, without the words enclosed in brackets, as follows:

"Although the jury may believe, from the evidence, that the plaintiff, on the night of July 22, 1886, was injured by stepping into a hole in a sidewalk on Jefferson street, in the village of Clayton, yet if the jury further believe, from the evidence, that the plaintiff's said injury was received by her while going home from a lodge meeting in the night aforesaid, and between nine and ten o'clock at night, and that said night was dark and cloudy, and if the jury further believe, from the evidence, that for some time prior to receiving said injury the plaintiff knew of the existence of said hole, and that said sidewalk at and about the place where she was injured was dangerous for persons going over it on foot, [in the night and darkness,] and if the jury further believe, from the evidence, that the plaintiff could [safely] have gone to her home from the building in which said lodge meeting was, by some other walk, [and knew that she could so go home safely by such other walk,] and that considering the hour and darkness of the night, [and that said sidewalk was dangerous, and all other facts and circumstances in evidence,] the exercise of ordinary care and prudence on the part of the plaintiff would have required her to have gone home from such lodge building by said other sidewalk, the jury are instructed that plaintiff did not herself exercise the degree of care and caution for her safety required by law, and the verdict of the jury in this case should be for the defendant."

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Opinion of the Court.

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The court refused the instruction as asked, and modified the same by inserting the words enclosed in brackets, and gave the same as modified.

Defendant also asked the court to give instruction No. 13, which the court refused to give as asked, but modified the same by inserting at the star the words, "and knew that she could safely go around and avoid the hole," and by striking out the words in brackets, and inserting in lieu thereof the words: "You should take these facts into consideration in passing upon the question whether, at the time of the alleged injury, the plaintiff was using reasonable and ordinary prudence and caution for her own safety," and gave the same as modified. The instruction as asked was as follows:

"Even if the jury believe, from the evidence, that the plaintiff was injured by stepping into a hole in a sidewalk on Jefferson street, in the village of Clayton, defendant, on the night of July 22, 1886, yet if you further believe, from the evidence, that the plaintiff, for some time prior to receiving her said injury, had known of the existence of said hole, and that said sidewalk was thereby rendered dangerous, and that said hole was plainly visible in the daylight to the sight, then the court further instructs you, that if you further believe, from the evidence, that after entering upon said sidewalk, and before reaching the said hole, the plaintiff safely, and without material inconvenience to herself, could have left said sidewalk, and by means of and on the street there being could have gone around said hole and avoided the same,\* and that she did not do so, then the court instructs you that [the plaintiff herself was guilty of such negligence that she can not recover in this case, and their verdict must be for the defendant.]"

The defendant also asked the court to give other instructions, which the court refused.

The ruling of the court upon these instructions given, modified and refused, presents the question whether a party receiving a personal injury while passing over a defective

## Opinion of the Court.

sidewalk, with knowledge of its true condition, is guilty of negligence contributing to the injury received, as a matter of law. The exposure of person or property to injury with knowledge of the danger to which the same is exposed, is undoubtedly evidence of negligence as a matter of fact. Therefore, if a person attempts to pass over a sidewalk, bridge or other structure, knowing the same to be in a dangerous condition, and in such attempt receives injury, his knowledge of the danger will presumptively establish contributory negligence. But such presumption is not conclusive. It is disputable, and may be rebutted by evidence of the exercise of ordinary care under the circumstances of the particular case. (Beach on Contributory Negligence, 40.) Contributory negligence is nothing more or less than negligence on the part of the plaintiff, and the rules of law applicable to negligence of a defendant are applicable thereto, (Beach on Contributory Negligence, sec. 161,) and, in general, the question of negligence is one of fact. Ibid. sec. 162; Merrill on City Negligence, 238; *Niven v. Rochester*, 76 N. Y. 619; *Fassett v. Roxbury*, 55 Vt. 552; *Chicago and Eastern Illinois Railroad Co. v. O'Connor*, 119 Ill. 586; *Missouri Furnace Co. v. Abend*, 107 id. 44; *Indianapolis and St. Louis Railroad Co. v. Morgenstern*, 106 id. 216; *Chicago and Alton Railroad Co. v. Bonifield*, 104 id. 223. Hence an instruction is properly refused which tells the jury, as a matter of law, that certain facts *per se* constitute negligence. *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Schmidt v. Chicago and Northwestern Railway Co.* 83 id. 405.

The law is, we think, well settled, that knowledge of the defect in the sidewalk, by the person injured, before he goes upon the same or before the injury, does not *per se* establish negligence upon his part. *Evans v. Utica*, 69 N. Y. 166; *Bassett v. Fish*, 76 id. 303; *Weed v. Ballston Spa*, id. 329; *Bullock v. New York*, 99 id. 654; *Montgomery v. Wright*, 72 Ala. 411; *Aurora v. Dale*, 90 Ill. 46; *Aurora v. Hillman*,

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Opinion of the Court.

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id. 65; *Osage City v. Brown*, 27 Kan. 74; *Dwire v. Bailey*, 131 Mass. 169; *McKenzie v. Northfield*, 30 Minn. 456; *Kenworthy v. Ironton*, 41 Wis. 647. The same rule is stated in the text books. Beach on Contributory Negligence (pp. 39, 40,) says: "While it is unquestionably true that one may voluntarily and unnecessarily expose himself or his property to danger without thereby becoming guilty of contributory negligence, as a matter of law, it is nevertheless an established rule that where one does knowingly put himself or his property in danger, there is a presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such a course of conduct. \* \* \* Knowledge, however, in this respect, does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence." In *Shearman and Redfield* (sec. 376) it is said: "The mere fact that a traveler is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. \* \* \* Such knowledge is a circumstance, and perhaps a strong one, but it should be submitted, with the other facts of the case, to a jury, for them to determine, whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury. \* \* \* But the mere fact that the obstructed street was out of the way of the point at which the traveler was aiming, or that he might have taken a nearer way, is immaterial, as it is the duty of the town to repair all the streets." See, also, *Erie v. Schwingle*, 22 Pa. St. 384; *Whittaker v. West Boylston*, 97 Mass. 273; *Merrill on City Negligence*, 139.

Contributory negligence is not shown by proof that after knowing the condition of the street the plaintiff traveled on it

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Opinion of the Court.

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after dark: (*Maltby v. Leavenworth*, 28 Kan. 745.) The fact that a traveler on a highway perceives that an obstacle therein is dangerous to persons attempting to pass it, is not conclusive that he does not use due care in making the attempt. (*Mahoney v. Mat. Railroad Co.* 104 Mass. 73; *Lyman v. Amherst*, 107 id. 339.) And this court has said, that traveling upon a sidewalk, by one having knowledge of dangerous defects therein, does not necessarily constitute negligence. (*Aurora v. Dale*, 90 Ill. 46.) That case was in many respects similar to the one at bar. So also in *Aurora v. Hillman*, *supra*, it was said: "Nor does the mere fact that plaintiff might have taken better and safer sidewalks than the one he did take, charge him with want of ordinary care."

The ultimate fact submitted to the jury in this case, in respect of the matter under consideration, was, whether the plaintiff was guilty of contributory negligence, and the fact that she returned home over the defective sidewalk, with knowledge of its unsafe condition, was a circumstance proper to be shown, as tending to establish such negligence. It was an evidentiary fact, and as such was properly allowed to go to the jury, as having a tendency to prove the ultimate fact in question. It was properly submitted, with all the other evidence illustrating the same question. The evidence shows that the route taken was her usual and most direct one to her home; that the night was dark, so that it was impossible to see the defect, and that owing to the darkness she failed to discover it in time to avert the injury. She testifies to the care she exercised. It was not her fault that the street was not lighted or that the sidewalk was unsafe. The hole in the walk was at one side, was small, and not easily discovered in the dark, and she might reasonably have expected to pass the same in safety. It can not be said, under the facts shown, that she acted recklessly or without due care. But be that as it may, the jury, upon full consideration, have found that

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Opinion of the Court.

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she exercised ordinary care, and that finding having been affirmed by the Appellate Court is conclusive upon that question of fact.

While it can not be material, in view of the authorities, it may be said there is no evidence that the plaintiff knew that the other route, which it is claimed she could have taken, was a safer one. The route she took was the one ordinarily used by her in going into the business part of the village and returning to her residence. It is not shown that she was familiar with the other route, and it can not be regarded as want of care that she should choose, in the night, the side-walk with which she was familiar, rather than the other. The law casts no obligation upon her to know, as a matter of fact, that the other route to her home was more safe than the one she chose.

Various objections are urged to other instructions given for plaintiff. No good purpose can be subserved by an extended examination of these instructions *seriatim*. We have considered them, and find no substantial error. Taken as a whole, the instructions given state the law with substantial accuracy. The court, at the instance of the defendant, gave seventeen instructions as asked, and modified two and gave them as modified, and refused fifteen. There was no substantial error in the modification, and in respect of the instructions refused, it is enough to say that so much of them as was proper to be given was embraced in those given.

There was no error in the admission or rejection of testimony that could affect the result.

Finding no substantial error, the judgment will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE CRAIG, dissenting.

## Syllabus.

B. A. SANDS *et al.*

v.

JOHN W. KAGEY.

*Filed at Springfield April 2, 1894.*

1. **EJECTMENT**—*legal title and right to possession, essential to recovery.* The general rule is, that in ejectment the legal title must prevail. But such is not always the case. The landlord, though the owner of the fee, can not recover against his tenant occupying under a lease, where there has been no forfeiture of the conditions of the lease.

2. So an assignee of a note secured by mortgage, in possession of the mortgaged premises, can not be turned out of possession in an action of ejectment brought by the mortgagee. An ejectment can not be maintained against an occupant of real estate so long as he is lawfully in possession, nor can the holder of the legal title recover if the legal right to the possession is in another.

3. The action of ejectment proceeds for the possession of the premises, claiming that they have been unlawfully entered into and unjustly withheld. Facts which go to disprove these make a legal defense.

4. It has been held that where a party has entered into possession under a contract of purchase, made valuable improvements, paid taxes, exercised acts of ownership over the property and paid the amount contracted to be paid, these are facts which may be proven, and amount to a defense in an action of ejectment brought by the vendor against the vendee.

5. In 1854 the owner of a tract of land gave a bond to a railway company for the conveyance of a strip for a right of way as soon as the line of the road should be located, and authorizing the company to enter and occupy. In 1872 the railway company took possession of the land without any objection by the owner of the legal title, and complied with its contract, and used the right of way up to 1891, when a grantee of the original owner brought ejectment: *Held*, that the plaintiff could not recover.

6. **POSSESSION**—*notice of equities.* The possession by a railway company of its right of way, by operating its trains over the same, is notice to the world of the title or equities held by such company.

7. **LACHES**—*who may not complain.* A railway company, eighteen years after the date of a bond by a land owner to convey it a right of way, took possession and constructed its track, etc., without objection by the obligor of the bond, who was still the owner of the land: *Held*, that a grantee of the owner could not set up and rely on the laches of

150	109
172	336
72a	57
150	109
80a	388

150	109
188	546

150	10
87a	56

150	10
98a	*62

150	10
199	*46

150	10
109a	*16

150	10
207	*156
e207	*157

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Statement of the case.

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the railway company, as he had no right until long after the company entered into possession.

8. PRACTICE—*waiver of jury—motion for new trial—whether necessary.* Where a jury is waived, and a cause is tried by the court alone, no motion for a new trial is required. If the bill of exceptions shows that the defendants excepted to the judgment rendered by the court in favor of the plaintiff, this is all that is required to entitle them to review the judgment on appeal or writ of error.

APPEAL from the Circuit Court of Piatt county; the Hon. FRANCIS M. WRIGHT, Judge, presiding.

This was an action of ejectment, brought by John W. Kagey, against B. A. Sands and R. B. F. Pierce, trustees, operating the Indianapolis, Decatur and Springfield railroad, to recover a strip of land fifty feet wide off the south end of the east half of the north-east quarter, and fifty feet off the north end of the west half of the south-east quarter, of section 31, all in township 16, north, range 6, east of the third principal meridian, in Piatt county, Illinois, it being a strip occupied as right of way for a railroad, by the Indiana and Illinois Central Railroad Company and its successors, since 1872.

The following is an agreed state of facts upon which a trial before the court without a jury was had, a jury having been waived:

"For the purpose of this second trial of this cause, it is agreed by the attorneys of the respective parties that Kagey, the plaintiff, shows a regular, perfect chain of title from the government, through John S. Hayward, by regular conveyances of the fee simple title, without reserving the railroad right of way in any of the deeds down to the plaintiff, in all the premises in controversy; that on July 2, 1891, plaintiff made demand, in writing, for the immediate possession of the premises in controversy, and that said notice was served upon the agent of the defendants by delivering to him a true copy thereof on said date; that this suit was commenced on Janu-



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Statement of the case.

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ary 23, 1891, no other notice to quit having been given; that on the 15th day of March, A. D. 1854, the same John S. Hayward, patentee, and his wife, gave to the Indiana and Illinois Central railroad their bond to convey, for the right of way, one hundred feet through the north half of section 31, township 16, north, range 6, east of the third principal meridian, being a part of the premises in controversy, as shown by said bond, which is admitted in evidence; that the Indiana and Illinois Central Railroad Company commenced work at building its railroad over said land on November 2, 1872, and built its railroad, and has since occupied the strip in controversy for right of way; that defendants are the legal successors of said Indiana and Illinois Central railroad, and claim under them, through said bond, as such successors; that both parties, plaintiff and defendants, have paid taxes on said strip of land since their occupancy of the same; that plaintiff and his grantees, back to the patentee, Hayward, have paid taxes on said lands since date of entry, in 1854. It is also agreed that John S. Hayward did not enter the lands in the south-east quarter of section 31, township 16, north, range 6, east, until the 1st day of May, 1854; that said lands were used as a right of way, when purchased by plaintiff, were not fenced, and were prairie; that the right of way is located on or near the line between the north half and south half of said section 31, township 16, north, range 6, east of the third principal meridian, and it is agreed that all deeds are admitted in evidence on this trial. It is also agreed that the center line of section 31, township 16, range 6, and section 36, township 16, range 5, Piatt county, Illinois, is just south of the south end of the ties of said Indianapolis, Decatur and Springfield railroad track."

The defendants also read in evidence a bond, under seal, executed by John S. Hayward and wife on the 15th day of March, 1854, in which they covenanted as follows: "In consideration of the probable location of the Indiana and Illinois Central railroad over and upon the premises hereinafter

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Brief for the Appellants.

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described, and one dollar to them in hand paid by said company, do hereby, for themselves, their heirs, executors, administrators and assigns, covenant and agree to and with the Indiana and Illinois Central Railway Company, to convey to said company, by a good and sufficient deed of quitclaim, with warranty against any claiming by or under them, at any time within one year from the date hereof, the right of way, of the width of one hundred feet, as the same shall be located through the lands and premises now owned and held by them, and described as follows: the same off of the south line of the north half of section thirty-one (31), township 16, north, range 6, east, Piatt county, Illinois, with full power, on the definite location of said road, to enter upon the said lands and premises of the width aforesaid, and to occupy, use and control the same, with all the rights privileges, profits and appurtenances of every kind, as in fee simple," etc.

The defendants also read in evidence a certificate, dated February 10, 1891, from Charles W. Pavey, Auditor of Public Accounts of the State of Illinois, certifying that the records of the United States land office, formerly located at Vandalia, Illinois, but now in his custody in pursuance of law, show that the north-east quarter and the south-east quarter of section 31, in township 16, north, range 6, east of the third principal meridian, were entered on the 22d day of March, 1853, by John S. Hayward.

Upon the evidence thus introduced, the court rendered judgment against the defendants, and for the purpose of reversing that judgment they have appealed to this court.

Messrs. LODGE & HICKS, for the appellants:

The action of ejectment proceeds on the theory of an unlawful entry and unjust detention. Any facts that go to disprove them make a good defense. *Railroad Co. v. Karnes*, 101 Ill. 402.

The relations between a railroad company and one having contracted to convey the right of way in consideration of the

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Brief for the Appellants.

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construction of the railroad over his lands, are pretty fully discussed in *Railroad Co. v. Hay*, 119 Ill. 493.

The bond was not recorded, but the operating of a railroad over the strip fifty feet wide, now claimed by the plaintiff, off the south side of the north-east quarter, was as good notice to the plaintiff, at the time of his purchase, as the record of the bond would have been. He was bound to take notice of the rights of the defendant when he purchased. *Crawford v. Railroad Co.* 112 Ill. 314; *Bank v. Dayton*, 116 id. 257; *Bank v. Sperling*, 113 id. 273; *Turpin v. Railroad Co.* 105 id. 11.

In this case, the stipulation shows that the Indiana and Illinois Central railroad had occupied the strip in controversy for the right of way since November, 1872; that the defendants are its legal successors, and claim under and through the bond as such successors. This they may lawfully do. *Railway Co. v. Needles*, 85 Ill. 462.

The grant of a right of way to a railroad company is not revocable after it is acted on. *Platt v. Railroad Co.* 65 N. C. 74; *Russell v. Hubbard*, 59 Ill. 335; *Morris v. Railway Co.* 76 id. 522; *Turpin v. Railroad Co.* 105 id. 11, and cases cited.

We submit that the settled rule of this court is, that a contract for a right of way, acted on and performed by the railroad company, which is in possession, operating the railroad, is a good bar to ejectment by the former owner or his grantees, and therefore the plaintiff can not maintain this action. *Kirby v. Railroad Co.* 109 Ill. 412; *Railroad Co. v. Hay*, 119 id. 493; *Railroad Co. v. Karnes*, 101 id. 402; *Turpin v. Railroad Co.* 105 id. 11.

An exception to the overruling of the formal motion for a new trial would have been of no avail, for the exception to the final judgment which is preserved in the bill of exceptions brings the whole case, on the law and evidence, before this court for review. No motion for a new trial was necessary. The court had passed on the evidence once, and the question is, did error intervene in its finding and final judgment.

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Brief for the Appellee. Opinion of the Court.

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*Metcalf v. Fouts*, 27 Ill. 110; *Mahony v. Davis*, 44 id. 288; *Jones v. Buffum*, 50 id. 277.

Mr. W. G. COCHRAN, for the appellee:

No exception was taken to the overruling of the motion for a new trial, and therefore no error can be assigned. *Martin v. Foulke*, 114 Ill. 206; *Daniels v. Shields*, 38 id. 197; *Gould v. Howe*, 127 id. 251; *Steffy v. People*, 130 id. 98.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The bill of exceptions does not show that the defendants excepted to the decision of the court overruling a motion for a new trial, and it is claimed that this court, in the absence of that fact from the bill of exceptions, will not review the decision of the circuit court. Section 61 of the Practice act provides: "Exceptions taken to the decisions upon the trial of causes in which the parties agree that both matters of law and fact may be tried by the court, and in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly taken and allowed, and the party excepting may assign for error before the Supreme Court any decision so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or the final judgment of the court upon the law and evidence." Under this statute no motion for a new trial was required: The bill of exceptions shows that the defendants excepted to the judgment rendered by the court in favor of the plaintiff, and that was all that was required to entitle them to review the judgment on appeal or writ of error. Moreover, we regard the question settled by former decisions. *Metcalf v. Fouts*, 27 Ill. 113; *Mahony v. Davis*, 44 id. 289; *Jones v. Buffum*, 50 id. 278.

It is also contended, that as plaintiff established the legal title to the premises, he was entitled to recover although there might be an equity in the defendants. The general rule is,

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Opinion of the Court.

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that in ejectment the legal title must prevail. But that is not always the case. The landlord, although the owner of the fee, can not recover against his tenant occupying under a lease, when there has been no forfeiture of the conditions of the lease. So an assignee of a note secured by mortgage, in possession of the mortgaged premises, can not be turned out of possession in an action of ejectment brought by the mortgagor, as held in *Kilgour v. Gockley*, 83 Ill. 109. In the same case it was also held that ejectment can not be maintained against an occupant of real estate so long as he is lawfully in possession. So in *Cobb v. Lavalle*, 89 Ill. 331, it was held that a plaintiff in ejectment can not recover, although he has title, when the legal right to the premises was in another. In *Stow v. Russell*, 36 Ill. 20, it was held that the action of ejectment proceeds for the possession of the premises, claiming that they have been unlawfully entered into and injuriously withheld. Facts which go to disprove this make a legal defense. It was also held, where a party has entered into possession under a contract of purchase, made valuable improvements, paid taxes, exercised acts of ownership over the property, and paid the amount contracted to be paid, they are facts which may be proven, and amount to a defense in an action of ejectment brought by the vendor against the vendee. Here the vendee entered into possession under a bond for a deed, made valuable improvements, and the consideration for the premises described in the bond has been fully paid. The possession of the defendant being lawful, we perceive no principle under which the vendor, or a purchaser from the vendor, can recover in an action of ejectment. In other words, a vendee in possession under a written contract which he has fully performed, may hold the possession of the premises as against the vendor. *Fleming v. Carter*, 70 Ill. 288.

Some importance is sought to be placed on the fact that the railroad company delayed entering upon the land from 1854 to 1872. The vendor, so far as appears, never found

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Syllabus.

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any fault with the vendee on account of the delay, and the delay is a matter that does not concern plaintiff, as he acquired no rights in the property until long after the railroad company entered into possession of the premises under the bond for a deed. The plaintiff was not an innocent purchaser. When he purchased, the defendant was in possession, and the possession was notice of the title held by the railroad company.

The judgment of the circuit court will be reversed and the cause remanded.

*Judgment reversed.*

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J. IRVING PEARCE

v.

MOSES TURNER *et al.*

*Filed at Springfield April 2, 1894.*

1. LEASE—*extension of term—option of lessor to extend or sell to lessee—construed.* In 1875 the owner of premises leased the same from May 1, 1875, to May 1, 1880. The lease was extended, from time to time, by indorsements made thereon, the last being April 23, 1890, extending the lease from May 1, 1890, to May 1, 1895, which indorsement was as follows: "This lease \* \* \* is extended five years from May 1, 1890, upon the same terms and conditions of above extension made and dated April 8, 1885. At expiration of this extension it shall be the privilege of the party of the first part, or his heirs or assigns, to extend the said lease from May 1, 1895, at \$1200 per year, payable in monthly installments, with all the conditions of the original lease, or to sell \* \* \* the party of the second part \* \* \* for \$30,000, the said party of the second part accepting the above conditions and terms." *Held*, that the extension of 1890 gave the lessee no rights in the property after May 1, 1895.

2. The advantage to be derived from the privilege was a part of the consideration for the extension of the lease from May 1, 1890, to May 1, 1895, and the fact that the lessee accepted the terms and conditions of the extension from May 1, 1890, to May 1, 1895, including the privilege in question, did not operate to impose upon the lessor a contract to either extend the lease to May, 1900, or sell the premises at the figure named.

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Opinion of the Court.

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APPEAL from the Circuit Court of Fulton county; the Hon. JEFFERSON ORR, Judge, presiding.

Mr. H. W. MASTERS, for the appellant.

Messrs. GRAY & WAGGONER, for the appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is a bill, filed by the executors of the will of Nathan Beadles, deceased, to construe said will and declare the rights of the parties, and also the rights of the appellant under the lease hereinafter mentioned. On March 26, 1875, Nathan Beadles, then of Lewistown, in Fulton County, leased certain premises in Chicago, Cook County, to the appellant from May 1, 1875, to May 1, 1880. The lease was extended from time to time by written agreements of extension endorsed thereon, the last being on April 23, 1890, extending the lease from May 1, 1890, to May 1, 1895, and in the following words:

"This lease, by mutual consent of the parties whose names are hereto attached, is extended five years from May 1, 1890, upon the same terms and conditions of above extension made and dated April 8, 1885. At expiration of this extension it shall be the privilege of the party of the first part, or his heirs or assigns, to extend the said lease five years from May 1, 1895, at \$1200 per year, payable in monthly installments, with all the conditions of the original lease, or to sell the party of the second part, his heirs or assigns, the within described property for \$30,000, the said party of the second part accepting the above conditions and terms, April 23, 1890.

N. BEADLES, [Seal.]

J. IRVING PEARCE. [Seal.]"

The agreement of extension made on April 8, 1885, provided, that the lease, by the mutual consent of the parties, was extended five years from May 1, 1885, upon condition that Pearce should pay Beadles \$1000.00 per year in installments of \$83.34 on May 1, 1885, and the same amount on the first

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Opinion of the Court.

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day of each and every month thereafter, during the lease; the said extension and lease being for the use of lot 13, as mentioned in the original lease, and in every other respect and condition as in the original lease remaining in full force and effect, leaving out everything pertaining to lot 12, as mentioned in the original lease.

It was claimed by the appellant in the court below that, by the terms of the extension of April 23, 1890, as above quoted, he was entitled either to hold the premises for a period of five years from May 1, 1895, or to purchase the same at that date for \$30,000.00; but the court decreed against this claim, holding it to be invalid, and finding that all interest of the appellant in the premises under the lease terminates on May 1, 1895. The present appeal is from this decree of the Circuit Court.

We are of the opinion that the trial court gave the correct construction to the extension made on April 23, 1890. The clause above quoted gave to Beadles the privilege of extending the lease from May 1, 1895, at an increased rental, or of selling the premises to Pearce for \$30,000.00. As the grant was of a mere privilege, which Beadles might or might not exercise as he saw fit, no binding obligation was imposed upon him, and no right to compel him to exercise the privilege was conferred upon Pearce. What was granted would not be a privilege, if its exercise was to be a matter of compulsion. The advantage to be derived from the privilege was a part of the consideration for the extension of the lease from May 1, 1890, to May 1, 1895. The fact that the party of the second part accepted the terms and conditions of the extension from May 1, 1890, to May 1, 1895, including the privilege in question, did not operate to impose upon the party of the first part a contract to either extend the lease to May, 1900, or sell the premises at the figure named.

The judgment of the Circuit Court is affirmed.

*Judgment affirmed.*



## Syllabus. Briefs of Counsel.

JAMES C. VANGIESON *et al.*

v.

FRANK HENDERSON *et al.*

Filed at Springfield April 2, 1894.

150	119
156	68
158	388

150	119
198	522

150	119
206	61
206	61
206	62

1. **WILLS**—*devise construed*—"heirs" a word of limitation. A testator provided by his will as follows: "After the death of my wife, as aforesaid, I give and bequeath unto my beloved daughter, N., during her natural life, and after her death to descend and vest in her legal heirs, thirty-five acres," describing the land: *Held*, that the daughter took the title to the land in fee.

2. **RULE IN SHELLY'S CASE**—*the word "heirs."* The rule is, whenever the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the word "heirs" is one of limitation of the estate, and not of purchase, and the ancestor takes the fee.

3. The word "heirs" being used in the generally accepted legal sense, is, under the rule, one of limitation, and no intention of the testator, however clearly expressed, can change it into a word of purchase.

APPEAL from the Circuit Court of Macoupin county; the Hon. JACOB FOUKE, Judge, presiding.

Mr. CHARLES A. WALKER, and Mr. ALEXANDER H. BELL, for the appellants:

In favor of a reversal, we refer to *Butler v. Huestis*, 68 Ill. 594; *Belslay v. Engel*, 107 id. 182; *Walker v. Pritchard*, 121 id. 221.

Messrs. RINAKE & RINAKE, for the appellees:

In support of the decree of the circuit court rendered in this case, see the following cases: *Carpenter v. Van Olinder*, 127 Ill. 42; *Baker v. Scott*, 62 id. 86; *Brislain v. Wilson*, 63 id. 173; *Lynch v. Swayne*, 83 id. 336; *Ryan v. Allen*, 120 id. 648; *Hageman v. Hageman*, 129 id. 164.

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Opinion of the Court.

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Mr. JUSTICE WILKIN delivered the opinion of the Court :

This is a bill for partition, involving a construction of the following clause of the last will of Aaron Vangieson, deceased :

"*Sixth*—After the death of my wife, as aforesaid, I give, devise and bequeath unto my beloved daughter, Nora A. Vangieson, during her natural life, and after her death to descend and vest in her legal heirs, thirty-five acres," etc., (describing the lands in controversy).

The wife of the testator died before he did, and the daughter, Nora A., became seized of the land upon the probate of her father's will, in February, 1887. She subsequently married appellee Frank Henderson, and in May, 1892, by her last will devised the same lands to him. She died September following, leaving no child or children or descendants of such. Her will was duly admitted to probate. Complainants, in their bill, claim for themselves and certain of the defendants, as brothers, nephews and nieces and heirs of Nora A., under the will of Aaron Vangieson, whereas the defendant Henderson claims under the will of his wife.

The sole question in the case is, did the will of her father vest the title in fee in Nora A., or did she take only a life estate. The question is not open to discussion under the decisions of this court. The rule in *Shelly's case* was held to be in force in this State more than twenty years ago, and that ruling has been uniformly adhered to since. It is not contended by counsel for appellants that any sufficient reason exists for overruling the decisions heretofore rendered to that effect, but an attempt is made to show that this case is not controlled by them.

The rule is : "Whenever the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the word 'heirs' is one of limitation of the estate, and not of purchase, and the ancestor takes the fee." It is difficult to see how language could have been employed to bring the

## Opinion of the Court.

devise more clearly within the rule, than was used by Aaron Vangieson in the above quoted sixth clause of his will. His daughter, Nora A., is expressly given an estate during her natural life,—viz., an estate of freehold,—and in that gift an estate is limited immediately to her heirs in fee.

Against the application of the rule, counsel earnestly urge the oft-repeated objection that it defeats the intention of the testator, and it is said an estate for life is expressly given Nora A. The word "heirs" being used in the generally accepted legal sense, is, under the rule, one of limitation, and no intention of the testator, however clearly expressed, can change it into a word of purchase. We held in *Baker et al. v. Scott*, 62 Ill. 88, that the rule in *Shelly's case* is in force here as a rule of property, and that the question of intent, in determining whether it is applicable in a given case, does not turn upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs, and it was shown in that case that in the great case of *Perrin v. Blake*, 4 Burr. 2579, (3 Greenl. Cruise on Real Prop. 313,) as finally decided in the Exchequer Chamber, it was admitted that the rule in *Shelly's case* often defeats the undoubted intention of the deviser, "for," it is said, "there never was an instance where an estate for life was expressly devised to the first taker, that the deviser intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention and vests the remainder in the ancestor." *Carpenter v. Van Olinder et al.* 127 Ill. 42; *Hageman et al. v. Hageman et al.* 129 id. 164; *Wolfer v. Hemmer et al.* 144 id. 554.

We are clearly of the opinion that Nora A. took the fee simple title to the premises in question under the will of her father, and that it passed, under her last will, to her husband.

The decree of the circuit court will accordingly be affirmed.

*Decree affirmed.*

THE PEOPLE *ex rel.* etc.,

v.

T. H. HANSON *et al.**Filed at Springfield April 2, 1894.*

1. ELECTION—*organization of village—form of ballot.* A ballot cast at an election to organize certain territory as a village, which reads, "Against corporation," can not be counted on the question of incorporation. The ballots should be "For village organization under the general law," or "Against village organization under the general law," as required by the statute.

2. CONTINUANCE—*motion not supported by affidavit.* On the contest of an election for the organization of a village, a ballot of a voter was informal, being "Against corporation," instead of "Against village organization under the general law." After this fact was discovered by those contesting, and during the trial, they asked the court to postpone the trial, to enable them to produce the voter to explain his vote, but the application was not based upon any affidavit showing diligence in producing the voter as a witness, or excuse for the want of diligence: *Held*, that the postponement was properly denied.

3. PRACTICE IN THE SUPREME COURT—*objections not raised in trial court—coming too late.* The rules of practice will not justify the reversal of a judgment upon a ground not suggested in the trial court, and raised in this court for the first time by way of reply, and when it is too late for the other side to be heard upon it. The general rule is, that the appellant must abide by the case made in his opening brief, and if he does not there show a sufficient ground for a reversal of the judgment, he can have no ground for complaint if it is affirmed.

APPEAL from the Circuit Court of Hancock county; the Hon. CHARLES J. SCOFIELD, Judge, presiding.

Messrs. J. B. RISSE & SON, Messrs. W. C. HOOKER & SON, and Mr. GEORGE EDMUNDS, for the appellants:

The court should have allowed plaintiff to produce the witness Finlay, and prove by him that he cast ballot No. 31, and intended thereby to vote against village organization under the general law. *People v. Matteson*, 17 Ill. 167; *Talkington v. Turner*, 71 id. 234; *Clark v. Robinson*, 88 id. 498; *McKinnon*

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54a	287
58a	338
58a	503

## Brief for the Appellees.

v. *People*, 110 id. 305; *Winmer v. Eaton*, 72 Iowa, 374; *Brown v. McCullom*, 76 id. 479.

One of the main questions presented is, whether said section 179, in respect to form of ballot, is imperative or directory. This section contains no negative words, or words prohibiting the use of a ballot in any other form. It is only when the provision of the statute is of the essence of the thing required to be done, that it is mandatory, in the absence of prohibitory words; otherwise, when it relates to form, and when an act is an incident, it is only directory. *Marshall v. Langworthy*, 6 Ill. 646; *Striker v. Kelly*, 7 id. 9; *Dement v. Rokker*, 126 Ill. 174; Endlich on Statutes, sec. 3, and cases cited.

Plaintiff was entitled to show the elector's intention in casting the ballot. *People v. Ferguson*, 8 N. Y. 102.

Whether a statute is directory or mandatory depends upon the sound construction of the nature and object of its requirement. *People v. Cook*, 14 Barb. 290; 8 N. Y. 67.

The intention is to be gathered from the necessity or reason of the enactment, and the meaning of the words, enlarged or restricted, according to the true intent. *Castner v. Walrod*, 83 Ill. 171; *Creese v. Aden*, 127 id. 237.

As to evidence to explain ballot, see *McKinnon v. People*, 110 Ill. 305; *Kreitz v. Behrensmeyer*, 125 id. 141.

MESSRS. SHARP & BERRY BROS., for the appellees:

The law giving the form of ballots is mandatory. 6 Am. and Eng. Ency. of Law, 325, 327; *State v. McKennon*, 8 Ore. 493.

In determining upon a majority, blank votes or illegal votes, if any, are not to be counted, and a candidate may be chosen without receiving a majority of the votes of all who actually participated in the election, although the law required a majority to elect. Cooley's Const. Lim. (5th ed.) sec. 614.

When the statute says certain words shall be on the ballot, we take it for granted that the requirement of the law must

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Opinion of the Court.

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be complied with, and where it has not been complied with, as in the case at bar, the ballot should be rejected. Mechem on Public Offices, chap. 5, sec. 191; *People v. Township Board*, 14 Mich. 28.

MR. JUSTICE BAILEY delivered the opinion of the Court:

This was an information in the nature of a *quo warranto*, brought by the state's attorney of Hancock county, on the relation of certain property-owners and tax-payers, to test the legality of the organization of the village of West Point, in that county. The information is brought against the officers of the village, and charges that, without any warrant or right whatsoever, T. H. Hanson was holding and exercising and had usurped the office of president, Henry Hinkle and five others the office of trustees, and J. W. Cunningham the office of clerk, of the village, and prays that they be required to answer by what warrant they hold and execute their respective offices.

The defendants, by their plea, set up in detail the proceedings for the organization of the village, resulting in an order declaring it duly organized, and calling an election for the choice of village officers, and that at such election the defendants were duly elected to their respective offices, and that they had qualified and taken possession of those offices, and that by that warrant they held the same and discharged the duties thereof.

To this plea the relators filed two replications, in the first of which it was alleged that, at the time of presenting the petition to be organized as a village, the territory embraced within the proposed organization did not contain three hundred inhabitants, and in the second of which it was alleged that, at the election upon the question of organizing as a village, there was not a majority of the votes polled in favor of organization.

Issues being duly joined upon these replications, the cause was tried before the court, a jury being waived, and upon such trial it was admitted that at the time of the presentation of

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Opinion of the Court.

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the petition for organization, the territory embraced in the proposed village contained three hundred inhabitants, thus disposing of the issue on the first replication. As applicable to the other issue, duly authenticated copies of the various proceedings alleged in the defendants' plea were read in evidence, including the poll-books, tally-sheets and returns of the election upon the question of organizing as a village, and also the certificate of the canvassing board, from which it appeared that forty-one votes were cast "For village organization under the general law," and forty votes "Against village organization under the general law," and that it was thereupon duly declared by the canvassing board that there was a majority of one vote cast "For village organization under the general law."

As it appeared, however, by the poll-books that eighty-two ballots were cast at the election, the court, at the instance of the relators, ordered the ballots to be opened and recounted, and upon such count it was found that forty-one votes were cast "For village organization under the general law," and forty votes "Against village organization under the general law," and that one ballot was cast on which were written the words, "Against corporation." This ballot had on it the number 31, and the name on the poll-book bearing that number was that of William B. Finley. The counsel for the relator thereupon asked the court to continue or postpone the trial to the following day, so that Finley, who, as counsel suggested, was old and infirm and lived about twelve miles distant, might be sent for as a witness, counsel stating that they would prove by Finley that he cast the ballot in question, and that he intended thereby to vote against village organization under the general law. The continuance or postponement of the trial asked for being objected to by counsel for the defendants, was denied by the court, and there being no further evidence offered, the court, after hearing the arguments of counsel, gave judgment in favor of defendants. From that judgment the relators have appealed to this court.

## Opinion of the Court.

Of course it is apparent that the judgment of the Circuit Court was reached only by disregarding and rejecting the ballot on which were written the words, "Against corporation," since if that ballot were counted as a vote "Against village organization under the general law," there would have been the same number of votes against as in favor of such organization, and there would consequently have been no majority in favor of organization, and the measure would have been defeated. The only question presented by the appeal then is, whether that ballot was properly rejected.

We think it very plain that the rejected ballot was not, on its face, entitled to be counted as a vote either for or against village organization. Section 2, of article 11, of the general law in relation to the organization of cities and villages, provides that, in proceedings to organize a village, each qualified voter, resident within the proposed village, shall have the right to cast a ballot at the election, with the words thereon, "For village organization under the general law," or "Against village organization under the general law," and by section 7 it is provided that if a majority of the votes cast at such election is for village organization under the general law, the proposed village, with the boundaries and name mentioned in the petition, shall from thenceforth be deemed an organized village under the statute. But it is claimed, (1) that it was competent for the relators to show by extrinsic evidence that the intention of the voter who cast the ballot was, to vote against village organization under the general law, and, (2) that the court erred in refusing to postpone the trial for the purpose of giving the relators an opportunity to produce the voter as a witness, so as to prove by him his intention in casting a ballot with the words "Against corporation" written thereon. It is manifest that if either of these two propositions is decided adversely to the relators, the judgment must be affirmed.

Without expressing any opinion then upon the question whether the rejected ballot might not have been explained by



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Additional opinion of the Court.

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the testimony of the voter, it is sufficient to say, that no error is shown to have been committed by the court in refusing to postpone the trial for the purpose of giving the relators an opportunity to produce the voter as a witness. At the time the application for such postponement was made, the trial was in progress. The application was based upon no affidavit or other proof, and nothing was submitted for the court to act upon beyond the mere unsworn suggestion of counsel. That suggestion was merely that the witness was old and feeble, and lived about twelve miles away, and that the relators could prove by him that he cast the ballot in question, and that he intended thereby to vote against village organization under the general law. No proof or suggestion even was made that the materiality of his testimony had then for the first time become known to counsel, nor was the least showing made of any diligence on their part in ascertaining the materiality of his testimony, or in procuring his attendance as a witness. It is too clear to require discussion, that no case was made out which made it the duty of the court to postpone the trial, and it follows that the refusal of the court to grant such postponement was not an error which can be assigned on appeal.

We find no error in the record, and the judgment will therefore be affirmed.

*Judgment affirmed.*

Upon an application for a rehearing, the following additional opinion was filed:

Per CURIAM: By their petition for a rehearing, the relators make the single point, that the election upon the question of organizing the village was not held under the Australian Ballot Law. This point was not made in the Circuit Court, and it was suggested in this court for the first time in the last six lines of the relators' reply brief. We did not notice it in our opinion because it came too late. The rules of practice will not justify the reversal of a judgment upon a ground not sug-

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Additional opinion of the Court.

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gested in the trial court, and raised in this court for the first time by way of reply, and when it is too late for the other side to be heard upon it. The general rule, and one from which we see no cause for departing in this case, is, that the appellants must abide by the case made in their opening brief, and if they do not there show a sufficient ground for a reversal of the judgment, they can have no ground of complaint if it is affirmed.

Furthermore, the question as to the mode in which the election was conducted was not presented by the pleadings. As is stated in the foregoing opinion, the replications filed to the plea setting up the proceedings which resulted in the organization of the village, including the election, raised but two issues of fact, viz., (1) that the territory embraced in the proposed village did not contain three hundred inhabitants, and (2) that at the election, there were not a majority of the votes polled in favor of organization. Of course, by familiar rules of pleading, all facts alleged in the plea and not traversed by the replications were impliedly admitted. The issue tendered by the first replication having been abandoned, the only issue before the court at the trial was, whether a majority of the votes polled were in favor of organization. The question as to the mode in which the election was held, or of its validity, was not presented by the pleadings, but the relators, by failing to raise the issue by replication, impliedly admitted that the election was valid. The issue tendered by them having been found against them, they will not be permitted now to go back and recall their admission, so as to raise a new issue.

We see no ground for awarding a rehearing, and the petition therefor will accordingly be denied.

*Rehearing denied.*

## Syllabus.

## THE TOWN OF BRUSHY MOUND

v.

WILLIAM McCLINTOCK, Jr.

*Filed at Springfield April 2, 1894.*

150	129
150	112
160	516
150	129
184	316
184	317
184	320
150	129
186	*260

1. **HIGHWAY—dedication—acceptance by the public.** The fencing of land to correspond with an old road not laid out, without acceptance after that by the public, does not constitute a highway by dedication.

2. **SAME—establishing by prescription—passive use.** The user of private property, to ripen into a prescriptive right, must be adverse to the owner. Mere passive use is never sufficient. It must also be open, adverse and under claim of right.

3. **SAME—by prescription—over uninclosed lands.** In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner. Express notice is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform the owner that the highway is used under a claim of right.

4. Where a road through uninclosed land was on a tortuous line, the little work done on it in all the years it had been traveled can not be said to be notice that it was being used under a claim of public right. Where the authorities allowed other parts of the way to be fenced up and changed, the owner of the land had the right to presume that the road over it was being used by the public just as it was over other lands, and that by permitting it to be so used none of his rights were waived.

5. **SAME—prescription—suffering parts of the road to be closed.** On the question whether a road is a highway by prescription, and especially where it is at least doubtful whether the user over a party's land was adverse, under a claim of right, or merely by permission, it is proper to show how the public authorities treated the road at other places, and that they suffered the owner of the lands to fence up the road.

6. **SAME—changes in the line.** In determining whether, under the evidence, a public highway has been established over a defendant's land, the testimony as to changes at other points is also to be considered, as it is a part of the evidence in the case bearing on that question.

150	129
196	*229
150	129
e201	163
150	129
e215	*169
215	*170
e215	*172

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Briefs of Counsel.

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WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Macoupin county; the Hon. JACOB FOUKE, Judge, presiding.

MESSRS. ANDERSON & BELL, for the plaintiff in error:

The cases of *Kyle v. Town of Logan*, 87 Ill. 64, and *Fox v. Virgin*, 5 Bradw. 515, are cited to show that the public can not acquire a highway, by prescription, over vacant land. In those cases the travel by the public had been confined to no particular line, nor had the road been maintained by the public as a highway.

If a single track be used as and for a public road, and be traveled generally by the public, as such, without objection by the owner of the land for more than twenty years, though not fenced on either side, it may become a highway by prescription. *Shugart v. Halliday*, 2 Bradw. 45.

Slight deviations in the line of travel, to avoid a temporary obstruction, will not defeat the prescriptive right. *Gentleman v. Soule*, 32 Ill. 271.

MR. R. B. SHIRLEY, for the defendant in error:

To establish a highway by prescription, it must be shown that the use of it, as such, has been public for twenty years, adverse or under claim of right, uninterrupted, with the acquiescence, and yet without agreement, of the owner of the land, made within that period. *Gentleman v. Soule*, 32 Ill. 271; *Toof v. Decatur*, 19 Bradw. 204.

The tract of land of appellee was wild, uninclosed timber or brush land. The mere acquiescence of the owner in public travel over his wild, uninclosed timber land for over twenty years is not sufficient to give the public title to any part of the land. *Fox v. Virgin*, 5 Bradw. 515.

The public does not acquire a public road over vacant and unoccupied land by travel over the same for twenty years or more, merely from acquiescence on the part of the owner.

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Opinion of the Court.

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*Kyle v. Town of Logan*, 87 Ill. 64; *Fox v. Virgin*, 5 Bradw. 513; *Warren v. Jacksonville*, 15 Ill. 236; *State v. Horn*, 35 Kan. 717.

The evidence, however, of those changes is important, in going to show that neither the public nor the public authorities ever held, or claimed to hold, the road adversely to the owners of the land,—an element which is necessary to an easement. A permissive use can not be adverse, and will not serve as a basis of a claim of right of way. *Pentland v. Keeps*, 41 Wis. 490; *Jones v. Davis*, 35 id. 376; *Talbot v. Grace*, 30 Ind. 389.

MR. JUSTICE WILKIN delivered the opinion of the Court:

Appellee was sued, before a justice of the peace, for placing and maintaining an obstruction in a public highway, and judgment was recovered against him. He appealed to the circuit court of Macoupin county, where the case was tried before the court without a jury, and judgment rendered in his favor. From that judgment appellant prosecutes this appeal.

The only substantial question in the case is, whether the *locus in quo* had become a public highway by prescription. There was a traveled way over the north-east quarter of the south-east quarter of section 16, township 9, range 7, Macoupin county, owned by appellee at the time, across which he erected fences—the alleged obstructions. This traveled route crossed the south line of the forty near the south-west corner, and ran in a meandering, north-easterly direction, to the north line, about thirty-two rods east of the north-east corner, thence east to the corner, and thence north. This road extending across the forty-acre tract was part of a continuous line of travel from south-west to north-east, which had been used by the public for more than twenty years, but it is not shown that any part of it was ever legally laid out and opened. During the earlier years of travel it was over uninclosed timber land. The land of appellee seems to have been post oak timber,

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Opinion of the Court.

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partly cut off and grown up in brush. There is no proof of a road having been opened over it, and from its meandering course the line of travel doubtless became fixed, as frequently happened in the early settlement of the country, by persons finding the most convenient way across timber land without cutting down the trees and bushes. The land remained vacant and uninclosed until about four years prior to the beginning of the suit before the justice of the peace, except that many years prior to that time one Julian, then owning the land, made an improvement on it, placing a fence across the road, and thereby changing the line of travel around a small orchard. The improvement was abandoned, and the old line was resumed about twenty-one or twenty-two years prior to the suit. There was, in 1878, a small amount of work done by the public on this land, at a hill near the south line, and there was perhaps some brush cut away at places to widen it. North and south of defendant's land work was done from time to time. It is not denied that within twenty years substantial changes had been made in the road, both north and south, by land owners fencing across it and forcing the travel around fields, upon the lines, and that the road authorities, without legal proceedings to vacate the old road or locate a new one, acquiesced in such changes. Over the defendant's land the travel has been substantially on the same line, except as it temporarily changed to avoid a "mud hole" or a "bush." About four years ago defendant inclosed the land on the east, and then built his fence near the east side of the road, following its meanderings, but in February, 1891, fenced across it near the north and south lines of his land.

Conceding that the act of building defendant's fence to correspond with the road indicated an intention to make a dedication to the public, there is no claim of acceptance after that time by the public, and hence it could not be successfully contended that there was a highway by dedication. In fact no such claim is made. Had a public road been established,

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Opinion of the Court.

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by prescription, over the defendant's land prior to February, 1891? The circuit court held there had not. It refused a proposition submitted by the plaintiff, holding "that, under the evidence in this case, a public highway is shown to exist at the time and place where and when the obstructions mentioned in the evidence were placed," etc. It also refused to hold several other propositions submitted by plaintiff, to the effect that changes at points not on defendant's land would not operate to defeat the right of the public to the highway at the places obstructed. Manifestly, our decision must turn upon the ruling of the court on the first proposition. Refusing it, rendered the others immaterial. In determining whether, under the evidence, a public highway was established over defendant's land, the testimony as to changes at other points was, of course, to be considered, because it was part of the evidence in the case bearing on that question, but there is nothing in the record from which it can be assumed that the case turned upon that particular fact.

It is well understood that the user of private property, to ripen into a prescriptive right, must be adverse to the owner. Mere permissive use is never sufficient. "It must also be open, adverse, and under claim of right." (*Gentleman v. Soule*, 32 Ill. 279.) "Our experience teaches that land has been used by the public in different parts of the State, for purposes of travel, when it was vacant and unoccupied, the owner having no occasion to occupy it exclusively. It would be unjust to say that the public, by this acquiescence, under such circumstances, acquired a title to a part of the land." (*Kyle v. Town of Logan*, 87 Ill. 64.) In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner. Express notice is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform

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Opinion of the Court.

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the owner that the highway is used under a claim of right. In the first place, it is unreasonable to suppose that road authorities would claim, or a property holder suspect, that a public highway was to be located on the tortuous line of the road in question. The little work done on it in all the years that it has been traveled can not be said to amount to notice that it was being used under a claim of public right. The work did not amount to an improvement of a public highway. It was rather for the temporary purposes of travel. If the intention had been to claim it as a public highway, it is but reasonable to suppose that it would have been opened out and improved, so that "driving around mud holes and bushes" would have been unnecessary.

But we think the slight circumstance of work having been done on defendant's land, as indicating a claim of public right, is more than rebutted by the fact that much more work was done at other places, and changes allowed to be made without objection. If the evidence had clearly established a prescriptive right over defendant's land, without reference to other parts of the road, that right would not have been defeated by obstructions and changes at other places, but when it is, to say the least, doubtful whether the user over defendant's land was adverse, under claim of right, or merely permissive, it is important to know how the public authorities treated it at other places. We think the owners of the forty-acre tract, as reasonably prudent men, had a right to presume that the road over it was being used by the public just as it was over other lands, and that by permitting it to be so used none of their rights were waived.

Our conclusion is that the circuit court was justified, from all the evidence in the case, in holding that the plaintiff failed to prove that the place obstructed was a public highway. Its judgment will therefore be affirmed.

*Judgment affirmed.*



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Syllabus.

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BENNETT JACOBSON

v.

SAMUEL GUNZBURG.

*Filed at Ottawa May 8, 1894.*

1. **EVIDENCE**—*held not prejudicial.* In an action upon notes and checks made in the name of Bennett Jacobson, where the controversy on the trial was whether Jacob and Morris Jacobson were authorized to execute the notes and checks, a witness was asked, "Do you know of any notes signed by Jacob, in defendant's name, that were paid by defendant?" The answer was: "Not that I know of. I know of such checks drawn on Bennett's bank at Grand Lodge, which were paid." The suit was abandoned as to the checks: *Held*, that the answer in no way prejudiced the defendant.

2. In the same case a witness was asked, "Do you know whether Jacob Jacobson had authority to sign Bennett Jacobson's name to commercial paper?" *Held*, that while it might have been better if the question had been confined to the notes and checks, yet there was no substantial error, as the form of the question could do the defendant no injury.

3. **INSTRUCTIONS**—*need not be repeated.* Where refused instructions contain correct propositions of law, yet if the instructions given contain all the law necessary for the jury to arrive at a correct verdict, there will be no error.

4. **NEW TRIAL**—*for cumulative and impeaching evidence.* As a general rule, new trials are not allowed to enable the production of newly discovered evidence which is merely cumulative, and in the nature of impeaching evidence.

5. **PRACTICE IN THE SUPREME COURT**—*immaterial questions not considered.* This court will not consider the propriety of a question to a witness, when the answer thereto is in no manner prejudicial to the party objecting to the same.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. BLUM & BLUM, for the plaintiff in error.

Messrs. McMURDY & JOB, for the defendant in error.

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Opinion of the Court.

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PER CURIAM: This was an action of assumpsit, brought by Samuel Gunzburg, against Bennett Jacobson, to recover the amount of two certain promissory notes and five checks which were executed in his name. Two of the checks were executed by Morris Jacobson, a brother of the defendant. The balance of the checks and notes were executed in the name of Bennett Jacobson, by his brother, Jacob Jacobson. The only controversy in the circuit court was, whether Morris and Jacob Jacobson were authorized by the defendant, Bennett Jacobson, to execute the notes and checks. In the circuit court the plaintiff recovered \$4215.41, the full amount of the notes and checks, but the plaintiff remitted \$1093.85, the amount of the checks, and judgment was rendered for the amount of the notes, \$3121.56. This judgment, on appeal, was affirmed in the Appellate Court, and the defendant has sued out this writ of error, claiming that the circuit court erred in the admission of evidence and in the instructions to the jury.

In the deposition of William Houseman the plaintiff asked the witness the following question: "Do you know of any notes signed by Jacob, in defendant's name, that were paid by defendant?" It is objected that this question was too general. Without stopping to determine whether the question was formal or informal, upon a reference to the answer of the witness it is apparent that the defendant's case was in no manner prejudiced by the question. The witness answered: "Not that I know of. I know of such checks drawn on Bennett's bank at Grand Lodge, which were paid." The answer in reference to the checks could do no harm, as the case was finally abandoned as to the checks and no recovery had on account of the checks, and as to the notes the witness had no knowledge on the subject. It is thus apparent that no damage resulted to the defendant by the question, conceding it to be informal.

It is also claimed that the following question propounded to the witness Charles W. McAllister was improper: "Do you

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Opinion of the Court.

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know whether Jacob Jacobson had authority to sign Bennett Jacobson's name to commercial paper?" Perhaps it would have been better if the question had been confined to the notes and checks, but at the same time, the notes and checks involved in the controversy were commercial paper, and we fail to see how the form of the question could do the defendant any injury.

The defendant requested the court to give six instructions, which the court refused, but prepared a like number of its own motion and gave them to the jury, and the action of the court is relied upon as error. We have carefully examined the instructions refused and those given, and while some of those refused contained correct propositions of law, it is manifest the instructions given contained all the law necessary for the jury to enable them to arrive at a correct verdict. Counsel, in their argument, find fault with some of the instructions which the court gave to the jury, but we find no substantial objection to them. The only question of any importance before the jury was, whether those who signed the name of the defendant to the notes and checks were authorized to do so. The issue involved was so plain and simple that the jury required but few instructions. These were given, and we find no error in the record so far as instructions are concerned.

The defendant entered a motion for a new trial on the ground of newly discovered evidence, which the court overruled. The newly discovered evidence was in the nature of impeaching testimony, and merely cumulative. New trials are not, as a general rule, allowed to enable the production of such evidence. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 395; *Abrahams v. Weiller*, 87 id. 179.

Perceiving no substantial error in the record the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

HARRY W. WRIGHT

v.

THE HIGHWAY COMMISSIONERS OF THE TOWN OF CARROLLTON.

*Filed at Springfield April 2, 1894.*

1. CERTIORARI AT COMMON LAW—*when the writ lies.* Proceedings of an inferior tribunal can not be brought before the circuit court for review upon writ of *certiorari* when this right of review exists upon appeal, and if a writ be improvidently issued in such case it should be dismissed.

2. While, by the adoption of the common law, we have adopted the common law remedy by *certiorari*, the law is, that such writ will lie only where no appeal or other mode of directly reviewing the proceeding of the inferior tribunal is provided by law.

3. HIGHWAYS—*power of supervisors, on appeal.* Any person interested in the decision of the commissioners of highways in laying out or refusing to lay out a highway, or in the verdict of the jury in assessing the damages, is given the right to an appeal to three supervisors, before whom the trial is to be *de novo*. This applies to appeals from the order of commissioners of highways in and about the laying out of roads for private and public use, under the provisions of section 54, chapter 121, of the Revised Statutes.

WRIT OF ERROR to the Circuit Court of Greene county; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. DOOLITTLE & PAINTER, for the plaintiff in error.

Mr. JAMES R. WARD, and Mr. FRANK A. WHITESIDE, for the defendants in error.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was a petition for a common law writ of *certiorari*, in the circuit court of Greene county, to review the action of the highway commissioners of the town of Carrollton, in said county, in ordering the laying out and location of a road for private and public use, under the provisions of section 54,

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Opinion of the Court.

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chapter 121, of the Revised Statutes, (2 Starr & Curtis, 2153,) and to set the same aside.

No question arises as to the jurisdiction of the highway commissioners, but the objections to the validity of their action in laying out the road relate to errors intervening in the proceedings. The objections are: First, the commissioners having failed to agree with the owners of land over which the road passed, as to the damages such owners would be entitled to by reason of the location of the road, made a certificate, in accordance with section 41 of the act, (2 Starr & Curtis, 2148,) and delivered the same to a justice of the peace, for the assessment of damages, by a jury, as prescribed by that section, and in such certificate failed to specify the width of the road proposed to be located; second, that the commissioners failed to file the assessment of damages, as required by section 49 of said act; and third, the commissioners, in their final order, did not provide for the payment of the damages by the town of Carrollton, when the jury found that only one-half of the damages assessed to the owners, Wright & Wright, would not be an unreasonable burthen on the petitioners for the road.

While we think that the record sufficiently shows these objections untenable, we prefer to place the decision upon other grounds. In *Trustees of Schools v. Shepherd et al.* 139 Ill. 114, we said: "The rule is, proceedings of an inferior tribunal can not be brought before the circuit court for review upon writ of *certiorari* when the right of review of the proceedings upon appeal exists, and if a writ be improvidently issued in such case it should be dismissed," citing *Doolittle v. Galena and Chicago Union Railroad Co.* 14 Ill. 381; *Chicago and Rock Island Railroad Co. v. Whipple*, 22 id. 105; *Same v. Fell*, 22 id. 333; *Naconlin v. Lowry*, 49 N. J. L. 391. That was a case where the trustees of schools re-districted the township into school districts, and the statute allowed an appeal to the superintendent of schools of the county, and it was therefore held that *certiorari* would not lie to review the record made by

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Opinion of the Court.

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the trustees. While, by the adoption of the common law, we have adopted the common law remedy by *certiorari*, the law is, that such writ will lie only where no appeal, or other mode of directly reviewing the proceedings of the inferior tribunal, is provided by law. *Miller v. Trustees, etc.* 88 Ill. 26; *Ennis v. Ennis*, 110 id. 78; *Glennon v. Burton*, 144 id. 551; *Commissioners v. Griffin et al.* 134 id. 339.

By the 59th section of the act, (2 Starr & Curtis, 2154,) "any person interested in the decision of the commissioners in determining to or in refusing to lay out \* \* \* any road, \* \* \* or in the verdict of any jury in assessing damages in opening \* \* \* any road, may appeal from such decision to three supervisors of the county," etc., and prescribes the mode of perfecting the same. The next section (60) confers the same power and authority upon the supervisors, summoned as therein provided, upon such appeal, as are by the act conferred upon the commissioners of highways, "not only in regard to the laying out \* \* \* any road, but shall have the same power to cause a jury to be called to assess damages, whenever the state of the proceedings require it, and the supervisors can not agree with the owners of the land in regard to the same." It is clearly contemplated that the proceeding, on appeal, shall be *de novo*, the supervisors exercising all the powers, and charged with the duties, enjoined by law upon the commissioners, in respect of the laying out of the road and determining the damages to be paid. It is clear that a remedy is provided by law where the action of the commissioners would not be final, and where, whatever errors they had committed, if any, could be corrected. To this tribunal appellants were committed by law, and having failed to avail themselves of the remedy provided, can not now complain.

The writ of *certiorari* having issued in a case not authorized by law, was properly dismissed by the court, and its order will be affirmed.

*Order affirmed.*

## Syllabus.

JACOB GRIMES

v.

GEORGE F. HILLIARY, Admr.

*Filed at Springfield April 2, 1894.*

150	141
169	130
150	141
81a	216
150	141
82a	647
150	141
201	*228

1. **AMENDMENT—of declaration.** Where the defendant moves the court to exclude all of the plaintiff's evidence, the latter may, by leave of court, amend his declaration.

2. **EVIDENCE—lost or destroyed note—degree of proof.** In an action of assumpsit upon a destroyed or lost promissory note, the defendant asked the court to instruct the jury that it was incumbent on the plaintiff to prove the allegation of his amended declaration, that the defendant destroyed the note, beyond a reasonable doubt, which the court refused: *Held*, that such instruction was properly refused.

3. **SAME—foundation for secondary—lost or destroyed note.** Where an action is brought upon lost or destroyed notes, the charge as to the manner of disposition of the notes is by way of excuse for not producing the original in evidence, and whether they were willfully or accidentally destroyed by the defendant is immaterial in laying the foundation for secondary proof.

4. The preliminary proof, laying the foundation for the introduction of secondary evidence of the contents of the lost instrument, is addressed to the court, and the court determines whether sufficient has been shown to permit the secondary evidence to go to the jury, and the recovery, if one is had, is upon the instrument thus proved.

5. **SAME—beyond reasonable doubt—in civil actions.** It has been held that where, under the pleadings, it becomes necessary to the maintenance of the plaintiff's cause of action or the defendant's defense to show that the opposite party has been guilty of a criminal offense, such offense must be proved beyond a reasonable doubt; but it does not follow that because an element may have entered into an act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proven to authorize a recovery in the civil action, the proof must be made beyond a reasonable doubt.

6. **SAME—of bill of discovery, explaining answer.** Upon a trial of an action at law the allegations of a bill of discovery filed by the plaintiff are not competent evidence, on behalf of the plaintiff, for the purpose of proving any fact alleged in such bill. The only purpose for which any portion of the bill, in such case, can go to the jury, is to point the answer, and show to what it is responsive, where the answer would be otherwise unintelligible.

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Statement of the case.

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7. Where a bill of discovery in aid of a suit at law, and the answer thereto, are read in evidence by the plaintiff, it is the duty of the court to limit the use to be made of the bill; but if the other party fails to ask any instructions or ruling of the court limiting it, he can not complain on appeal or error.

8. *PROMISSORY NOTE—in hands of maker—presumption of payment.* It is the general rule, that when a promissory note, due bill or other instrument for the payment of money is found in the possession of the maker, the presumption of payment arises. But this presumption does not arise when the debtor has had the means of obtaining possession or of canceling the obligation other than by paying it. In such case there is simply no presumption that the note is or is not paid, leaving the party having the affirmative upon that issue to establish the fact of payment.

9. *DECLARATION—whether it charges a criminal act.* An amended declaration charged that the defendant "wrongfully took" and "unlawfully destroyed" the notes upon which he was sued, but did not charge that the act was fraudulently and maliciously done, with intent to defraud: *Held*, that the declaration did not charge any criminal offense, and that it was not necessary to maintain the cause of action to prove the defendant guilty of a criminal offense.

10. *PRACTICE—motion to exclude plaintiff's evidence.* A motion by the defendant to exclude all of the plaintiff's evidence is properly overruled when such evidence tends to establish plaintiff's right of recovery under amended counts filed by leave of court.

11. If a defendant, after the refusal of the court to exclude all the plaintiff's evidence, introduces evidence and proceeds with the trial, and does not thereafter renew his motion, he will waive the right to insist upon his motion, or assign the refusal of the motion for error.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. EDWARD P. VAIL, Judge, presiding.

Appellee, administrator of the estate of Jacob Grimes, Sr., brought assumpsit against appellant, counting on two promissory notes, in several counts, each note bearing date August 15, 1876, due five and ten years after date, respectively, without interest, made by appellant to his intestate, and alleging in the several counts that said notes had been lost or destroyed, and after due search could not be found. The general issue was interposed and the cause tried by jury. At the close of



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Opinion of the Court.

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the plaintiff's evidence defendant moved the court to exclude it from the jury and to direct a verdict for him, and the plaintiff entered a cross-motion for leave to amend the declaration, which was granted. The plaintiff thereupon filed two amended counts, in which, after setting up the indebtedness, the making and delivery of the notes, and the maturing and non-payment thereof, it is alleged, in the first, that the notes were in the possession of the payee, severally, unpaid, and that the defendant, in the lifetime of said payee, without his knowledge or consent, unlawfully took and destroyed the same, and that afterwards the payee departed this life and plaintiff was appointed his administrator, etc.; and in the second, that said notes were in the possession of Jacob Grimes, Sr., the payee, at his death, and being in the dwelling-house of defendant, where the said Jacob Grimes, Sr., had recently died, and still unpaid, he, the defendant, unlawfully took said notes from the place where they were kept by the payee, and destroyed them, thereby, etc., alleging non-payment and letters of administration, as in previous counts. Thereupon the motion to exclude was overruled.

The jury found for the plaintiff in the sum of \$1094.66. Motion for a new trial was overruled and judgment entered upon the verdict. On appeal to the Appellate Court this judgment was affirmed, and the defendant below prosecutes this further appeal.

Messrs. LAWRENCE & LAWRENCE, for the appellant.

Mr. E. R. E. KIMBROUGH, and Messrs. CALHOUN, STELLY & JONES, for the appellee.

Mr. JUSTICE SHORE delivered the opinion of the Court:

All controverted questions of fact have been settled by the judgment of the Appellate Court, and it remains to consider only questions of law arising upon the record.

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Opinion of the Court.

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*First*—At the conclusion of the plaintiff's case the defendant moved the court to exclude the evidence from the jury and direct a verdict in his behalf. The plaintiff entered a cross-motion for leave to amend the declaration, which was allowed, and the motion to exclude overruled. Thereupon the defendant introduced evidence to sustain the issues on his part, and the cause was submitted to the jury without renewal of the motion. Leave to amend was fully authorized by section 24 of the Practice act. No surprise thereby to the defendant is suggested. He proceeded with the trial, treating the plea already filed as applying to the amended counts. The motion to exclude was properly overruled, for the reason that there was evidence tending to establish the plaintiff's right of recovery under the amended counts. Moreover, the defendant waived his right to insist upon the motion by the introduction of evidence and proceeding with the trial. *Joliet, Aurora and Northern Railway Co. v. Velie*, 140 Ill. 59.

*Second*—A bill for discovery had been filed by the plaintiff, against the defendant, praying for discovery, to enable the plaintiff to prosecute an action at law for recovery upon the promissory notes mentioned in the declaration. The sole purpose of the bill was to discover the date of the notes, rate of interest, and when and where the same were payable. The bill was answered under oath, and disclosed that the notes were of the same date, August 15, 1876; that no rate of interest was expressed and no place of payment mentioned therein; that the note for \$1000 was due in five years after its date, and the one for \$900 in ten years after date. Upon the trial the bill and answer were offered in evidence, and it is objected that the court permitted the bill to be read to the jury, over the objection of the defendant. The allegations of the bill were not competent evidence for the purpose of proving any fact therein alleged. The only purpose for which any portion of the bill could go to the jury was to point the answer and show to what it was responsive, where the answer would

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Opinion of the Court.

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be otherwise unintelligible. The answer was so drawn, in this case, that it was necessary to read portions of the charging part of the bill and interrogatories, to render it intelligible and to show to what the answer related. It was the duty of the court, if asked, to have limited the use to be made of the bill. The defendant having failed to ask any instruction or ruling of the court limiting it, can not now be heard to complain. In any event, it is impossible that the defendant should have been prejudiced by the reading of any portion of the bill to which the answer was responsive.

*Third*—It is next insisted that the court erred in refusing to instruct the jury, at the instance of the defendant, that it was incumbent upon the plaintiff to prove the allegations of his amended declaration, that the defendant destroyed the notes, beyond a reasonable doubt. The action was assumpsit, upon the promissory notes given by the defendant to plaintiff's intestate, and the charge in the amended declaration, as to the manner of disposition or destruction of the notes, was alleged by way of excuse to the plaintiff for not producing the original instruments in evidence. Whether they were wilfully or accidentally destroyed was immaterial in laying the foundation for secondary proof. It is well settled that the preliminary proof, laying the foundation for the introduction of secondary evidence of the contents of the lost instrument, is addressed to the court, and the court determines whether sufficient has been shown to permit the secondary evidence to go to the jury, and the recovery is had, if at all, upon the instrument thus proved. (*O'Neil v. O'Neil*, 123 Ill. 360; *Dormady v. State Bank*, 2 Scam. 236; *Palmer v. Logan*, 3 id. 56; 1 Thompson on Trials, 324.) If this view be correct, it is apparent that the instruction was properly refused.

It is, however, insisted, that by the amended counts filed the action was changed to *case*, and recovery was sought for the wrongful and tortious act of the defendant, and, it is said, a criminal offense is charged, and that it must be proved be-

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Opinion of the Court.

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yond a reasonable doubt. If it be conceded that the action and basis of recovery were changed, as insisted, the position is equally untenable. The charge in the declaration was, that he "wrongfully took" and "unlawfully destroyed" the notes in controversy. It is not charged that the act was fraudulently and maliciously done, with intent to defraud, etc., as would be required in charging the offense created by section 194 (Starr & Curtis, par. 246,) of the Criminal Code. Nor would it be necessary, to maintain the cause of action, to prove the defendant guilty of a criminal offense. Every unauthorized trespass upon or taking of property of another, or destroying it, is wrongful, and therefore unlawful, but not necessarily criminal. It has been held that where, under the pleadings, it becomes necessary to the maintenance of the plaintiff's cause of action or the defendant's defense to show that the opposite party has been guilty of a criminal offense, such offense must be proved beyond a reasonable doubt. (*Germania Ins. Co. v. Klewer*, 129 Ill. 612; *McConnel v. Mutual Ins. Co.* 18 id. 228; *Crandall v. Dawson*, 1 Gilm. 556; *Sprague v. Dodge*, 48 Ill. 142.) If this rule is to be adhered to, in respect of which we express no opinion, the case at bar is clearly distinguishable from the cases cited. It does not follow, that because an element may have entered into the act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proved to authorize a recovery in the civil action, the proof must be made beyond a reasonable doubt. (*Riggs v. Powell*, 142 Ill. 453, and cases *supra*.) The evidence tending to show the destruction of the notes was permitted to go to the jury without objection.

The real contest in the case was whether the notes had, in fact, been paid and delivered to the defendant in the lifetime of the payee, and the court very properly submitted all of the attendant facts and circumstances tending to illustrate the question. At the instance of the defendant the court instructed the jury, "that this action is upon two promissory

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Opinion of the Court.

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notes, and the recovery is confined to the notes, and not to the original consideration for which the notes were given. The issue is, whether or not the notes in question were wrongfully taken possession of by the defendant, and destroyed without having been paid by the defendant." And by another instruction: "That a failure of a party to produce a promissory note or notes in the trial of a cause upon which the action is founded," creates "a presumption that the note or notes have been paid or satisfied or never existed, and the burden of proof is on the one who seeks to recover upon the same, that such notes were actually made, that they have been lost or destroyed while in the possession of the holder and owner of the same, without his consent, and that they have not been paid."

*Fourth*—It is also insisted that the court erred in giving plaintiff's fifth instruction. The instruction, in effect, told the jury, that if the \$900 note bore no interest, and was not due at the time of the death of the payee, there was no presumption of law that it had been paid, but that the burden was upon the defendant to show that the note had been paid by him. While this instruction may be subject to criticism, it could not have misled the jury to the prejudice of the defendant. The defendant, admitting that the notes had been in his possession, offered proof tending to show that he had an accounting and settlement with his father, the payee, and that the notes were surrendered to him and destroyed before his father's death, and before this note was due. The plaintiff introduced in evidence declarations of the defendant showing that he had destroyed the notes, but which were accompanied with the further declaration that he had paid them. The evidence tended to show that he made contradictory statements in respect of the notes, as, that he could produce them when they were called for, and that he had paid them off and burned them many years ago. The payee of the note went to live with the defendant, and as a member of his family, about a year before his death. At the time he went there the notes

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Opinion of the Court.

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were in the possession of the father, and kept by him, with other papers, in a valise or small trunk. The father was old and infirm and transacted no business during the year preceding his death, and the evidence tended to show that nothing came to the hands of the administrator which could have been the proceeds of these notes. The effects of the deceased were, at his death, left in the house of the defendant, and shortly thereafter persons interested in the estate, and others, were called in or went to inspect the same. A key to the valise of the deceased was produced by the defendant, which unlocked it, and in which were found divers notes and papers, but not the notes in controversy. When asked in respect of them, defendant said he had paid them off years ago.

In view of this evidence introduced by the plaintiff, the presumption of payment, ordinarily arising from the possession by the payor or maker of a promissory note, draft, or the like, would not obtain. It is the general rule, that where a promissory note, due bill, or other instrument for the payment of money, is found in the possession of the maker, the presumption of payment arises. (*Sutphen v. Cushman*, 35 Ill. 186; *Tedens v. Schumers*, 112 id. 263; *Lawson on Presumptive Evidence*, rule 75.) *Lawson's* rule 76 is: "The presumption in rule 75 (being the presumption before stated) does not arise where the debtor had the means of obtaining possession of or of cancelling the obligation other than by paying it." (*Lawson on Presumptive Evidence*, 355.) In *Gray v. Gray*, 47 N. Y. 552, a father held the note of his son for \$425. After the father's death, suit was brought upon the note, which was produced by the son, cancelled. It appearing that the son had access to his father's papers, it was held that the presumption of payment did not arise. In *Pothier on Obligations* (vol. 1, p. 573,) it is said that *Boiceau* lays down the rule, that possession of a note affords presumption of its payment, but if a release from the debt be alleged, it must be proved, for a release is a donation, and a donation ought not

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Opinion of the Court.

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to be presumed. From this latter statement Pothier dissents, and thinks the donation should be presumed unless the creditor shows to the contrary. Pothier then adds: "A distinction adduced by Boiceau, founded upon the relative situation of the debtor, is more plausible. If the debtor were the general agent or clerk of the creditor, having access to his papers, possession alone might not be a sufficient presumption either of payment or release. So if he was a neighbor, into whose house the effects of the creditor had been removed on account of a fire."

Ordinarily the owner of a note retains it until it is paid. Hence, where it is found in the possession of the maker, the presumption of payment arises. But where the maker has access to the papers of the holder, and may have acquired the note as well without payment as with, the presumption of payment does not arise. There is no presumption prejudicial to the maker from the possession, simply, for the reason that the presumption of innocence would repel it. There is simply no presumption that the note is, or is not, paid, leaving the party having the affirmative upon that issue to establish the fact of payment. This, it is apparent from this record, the defendant undertook to do, but the issue of fact has been determined against him. It is apparent that the court did not err in instructing the jury, under the peculiar facts of this case, that there was no presumption of payment, and that the burthen of proving it was upon the defendant.

Other errors are assigned which have been considered, and, in effect, disposed of, in what has preceded, so far as they are deemed of controlling importance.

We are of opinion that no substantial error has intervened, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## Syllabus.

W. J. KEW

v.

JOHN W. TRAINOR.

*Filed at Ottawa May 8, 1894.*

1. **LEASE—breach of covenant not to assign—rights of lessor.** A lease contained an agreement of the lessee that neither he nor his legal representatives would underlet said premises, or any part thereof, or assign the lease, without the written consent of the lessor, and then provided that if default should be made in any of the agreements or covenants of the lessee, (which included the covenant not to assign,) then the lessor should have the right to declare the term ended, and re-enter: *Held*, that this was not a mere covenant not to assign, but was a power of re-entry for a breach of a covenant, having the force of a condition.

2. A lease contained a covenant that neither the lessee nor his legal representatives would assign the same without the lessor's written consent, and provided for a forfeiture and right of re-entry by the lessor for the breach of any of the covenants. The lessee, with the written consent of the lessor, assigned the lease, with a stipulation that no further assignment should be made without like assent of the lessor: *Held*, that the lessor had the right to forfeit the term, and re-enter, for an assignment of the lease by the assignee without his consent.

3. **SAME—rights and liabilities of assignee of lessee.** A party, by accepting the assignment of a lease, and agreeing to perform all the covenants and conditions of the lessee, becomes obligated to perform all the terms and conditions of the lease in as full and complete a manner as the original lessee; and when the assignee, in consideration of the lessor's written consent to the assignment, stipulates that no further assignment shall be made without the written consent of the lessor, and expressly agrees to perform all the covenants and conditions of the lease, he thereby assumes the position of the original lessee, and will have the same powers of the original lessee, and no other.

4. **DEEDS—rule of construction—intention.** It may be true that in the construction of deeds courts will incline to interpret the language as a covenant, rather than as a condition; but the intention of the parties to the instrument, when clearly ascertained, must control.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.



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Brief for the Appellant.

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Messrs OSBORNE BROS. & BURGETT, for the appellant:

The lessor has no right of re-entry for a breach of the covenant not to assign without his consent, unless the right is expressly reserved. The lease gave the lessor the right of re-entry in case of assignment by the lessee or his legal representatives. *Hague v. Ahrens*, 53 Fed. Rep. 583; *Ayer v. Emery*, 14 Allen, 67; *Hoyt v. Kimball*, 49 N. H. 522; *Paschall v. Passmore*, 15 Pa. St. 295; *Johnson v. Gurley*, 52 Texas, 222; *Board of Education v. Trustees*, 63 Ill. 204; *Gallagher v. Herbert*, 117 id. 160.

Courts always construe clauses in deeds as covenants, rather than conditions, if they can reasonably do so. See the above cases, and *Lynde v. Hough*, 27 Barb. 415; *Bloom v. Insurance Co.* 45 Wis. 622; *Livingston v. Stickles*, 7 Hill, 254; *Thornton v. Tramwell*, 39 Ga. 202.

The absence of a clause of re-entry, or a provision that in a certain event the estate shall cease, is important in determining whether the clause in a deed is a condition or a mere covenant. *Hoyt v. Kimball*, 49 N. H. 322; *Hartung v. Witte*, 59 Wis. 285; *Thornton v. Tramwell*, 39 Ga. 202; *Rawson v. Inhabitants*, 7 Allen, 125; *Ayer v. Emery*, 14 id. 67; *Packard v. Ames*, 16 Gray, 327.

A mere agreement not to assign without the lessor's written consent, does not imply a right of re-entry on breach of such agreement. *Barnes v. McCubbin*, 3 Kan. 221; *Shaw v. Coffin*, 14 C. B. N. S. (108 E. C. L.) 372; *Hague v. Ahrens*, 53 Fed. Rep. 58; *Crowley v. Price*, L. R. 10 Q. B. 302; *Johnson v. Gurley*, 52 Texas, 222; 1 Taylor on Landlord and Tenant, (8th ed.) sec 291.

The covenant in the lease that "neither he (the lessee) nor his legal representatives" would assign the lease without the lessor's consent, did not bind Russell, the lessee's assignee, not to assign without the like consent. *Expressio unius est exclusio alterius*. *Chipman v. Emeric*, 5 Cal. 49; *Doe v. Smith*,

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 Brief for the Appellee.
 

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5 Taunt. 795; *Barron v. Duncan*, 6 La. Ann. 100; *Siefke v. Koch*, 31 How. Pr. 383; *Jones v. Jones*, 12 Ves. 186; *Gregson v. Harrison*, 2 T. R. 426; *Pennock v. Lyons*, 118 Mass. 92; *McCormick v. Stowell*, 138 id. 431; *Lynde v. Hough*, 27 Barb. 415; *Emerson v. Simpson*, 43 N. H. 475; *Hansen v. Meyer*, 81 Ill. 321; 2 Platt on Leases, 265; 1 Taylor on Landlord and Tenant, (8th ed.) secs. 408, 403, note, 407, note; 1 Wood on Landlord and Tenant, (2d ed.) 715, note; *Page v. Palmer*, 48 N. H. 385.

The assignment by the lessee to Russell, and with Trainor's consent, constituted a new contract between Trainor and Russell, and did not carry with it a provision for re-entry by Trainor in case Russell made an assignment without Trainor's assent. *Brummell v. McPherson*, 14 Ves. 173; *Laboree v. Carleton*, 53 Me. 211; *Walsh v. Martin* 69 Mich. 29; *Van- Franken v. Railroad Co.* 55 Iowa, 135.

The reason of such holding is this: By assenting to the first assignment the lessor enters into a new contract with the assignee, which will not, without express stipulation, carry with it the provision for re-entry contained in the lease. 1 Wood on Landlord and Tenant, (2d ed.) sec. 276; 1 Taylor on Landlord and Tenant, (8th ed.) sec. 286, note; *Chipman v. Emeric*, 5 Cal. 49; *Voris v. Renshaw*, 49 Ill. 425; *Pennock v. Lyons*, 118 Mass. 92; *Murray v. Harway*, 56 N. Y. 337; *Dakin v. Williams*, 17 Wend. 448; *Siefke v. Koch*, 31 How. Pr. 383.

Messrs. WINSTON & MEAGHER, for the appellee:

A covenant instead of a condition will not be implied against the clear intentions of the parties. Woodfall on Landlord and Tenant, 313; 3 Kent's Com. 432; Wood on Landlord and Tenant, (2d ed.) 623, sec. 299; Washburn on Real Prop. 426-430.

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Opinion of the Court.

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Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of forcible detainer, brought by John W. Trainor, against W. J. Kew, to recover the possession of a certain store-room, known as No. 71 East Harrison street, Chicago. In the circuit court a trial before a jury resulted in a verdict and judgment in favor of the plaintiff, and on appeal to the Appellate Court the judgment was affirmed.

It appears from the record that Trainor, on the first day of April, 1892, leased the premises in controversy to E. Gonzalez, from April 1, 1892, until March 31, 1895, for the sum of \$1800, payable in installments of \$50 each month, at the beginning of the month. The lease, among other provisions, contained the following: First, that at the expiration of the specified term, or sooner determination thereof by forfeiture, he, the lessee, will yield up said premises to the lessor; second, "that neither he (the lessee) nor his legal representatives, will underlet said premises or assign this lease without the written assent" of the lessor being first had; third, that if default be made in any of the covenants in the lease, it should be lawful for the lessor to declare the term ended and re-enter upon the premises, and again enjoy the same as in his former estate; fourth, that if the term shall be ended in any way, and the lessee should remain in possession, he should be deemed guilty of a forcible detainer of the premises under the statute, and "be subject to all the conditions and provisions above named," and to removal; fifth, that the lessee waived notice of the election of the lessor to declare the lease ended under any of the provisions of the lease.

Gonzalez entered into possession of the premises under the lease, and carried on the cigar business until June 13, 1892, when he agreed to assign his lease to O. G. F. Russell. The lessor consented to an assignment of the lease to Russell, by a written indorsement upon the back of the lease, as follows:

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Opinion of the Court.

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"I hereby consent to the assignment of the within lease to O. G. F. Russell, on the express condition, however, that the assignor (lessee) shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party, as therein mentioned, and that no further assignment of said lease or sub-letting of the premises, or any part thereof, shall be made without my written assent first had thereto.

"Witness my hand and seal this 13th day of June, A. D. 1892.

J. W. TRAINOR. [Seal.]"

At the same time Gonzalez and Russell signed and sealed an indorsement on the lease, as follows:

"For value received, I hereby assign my right, title and interest in and to the within lease unto O. G. F. Russell, his heirs and assigns, and in consideration of the consent to this assignment by the lessor, I guarantee the performance by said O. G. F. Russell of all the covenants on the part of the second party in said lease mentioned.

"In consideration of the above assignment, and the written consent of the party of the first part thereto, I hereby assume and agree to make all the payments and perform all the covenants and conditions of the within lease by said party of the second part to be made and performed.

"Witness my hand and seal this 13th day of June, 1892.

E. GONZALEZ, [Seal.]

O. G. F. RUSSELL. [Seal.]"

After the assignment Russell went into the possession of the premises, and occupied the same until October 31, 1892, when, without the knowledge or consent of the lessor, he assigned the lease to appellant, Kew, and turned over the possession of the premises to him. On December 2, 1892, the appellee, Trainor, served a written notice on Russell and Kew that the assignment was contrary to the covenants of the lease; that he had elected to terminate the lease, and demanded pos-

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Opinion of the Court.

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session of the premises. The appellant refusing to surrender possession, this action was brought.

It is first claimed by counsel for appellant that the clause in the lease whereby the lessee agreed that "neither he nor his legal representatives" would assign the lease without the lessor's written consent, was a mere covenant, and did not constitute a condition upon which the term was held. Upon this branch of the case the lease contained the following provisions: "It is further agreed by the said party of the second part (the lessee), that neither he nor his legal representatives will underlet said premises, or any part thereof, or assign this lease, without the written assent of the said party of the first part (the lessor) had and obtained thereto." And further: "It is expressly understood and agreed by and between the parties aforesaid, \* \* \* if default shall be made in any of the covenants or agreements herein contained, to be kept by the said party of the second part, his executors, administrators and assigns, it shall be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his election, to declare said term ended, and into said premises, or any part thereof, with or without process of law, to re-enter," etc.

There is nothing ambiguous or uncertain in regard to this portion of the lease. In plain terms the lessee agrees not to underlet or assign the lease without the written assent of the lessor. Then follows the mutual agreement of the lessor and lessee that if default should be made in any of the covenants or agreements of the lessee, (which included the covenant not to assign the lease without the written assent of the lessor,) then the lessor had the right to declare the term ended, and re-enter. This is not a mere covenant not to assign, but it is a power of re-entry for a breach of a covenant, and this, as declared by Taylor on Landlord and Tenant, (sec. 278,) has the force of a condition. It may be true that in the construction of deeds courts will incline to interpret the language

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Opinion of the Court.

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as a covenant, rather than as a condition. (*Gallaher v. Herbert*, 117 Ill. 160.) But the intention of the parties to the instrument, when clearly ascertained, must control. (4 Kent, 132.) Here, there is no room to doubt what the intention of the parties was. The intention is declared in plain language. The lessor, in making the lease, inserted the clause prohibiting the lessee from assigning, in order that he might be enabled to prevent a tenant from being forced upon him whom he did not wish to occupy his property. But of what avail is that clause in the lease unless it is a condition upon which the term depended? Take away the right of forfeiture and re-entry, and the covenant of the tenant not to assign the lease is of no avail whatever. Where a lease contains no provision forbidding the lessee from assigning the lease, he may, if he so desires, transfer the lease without the consent of the landlord; but at the same time it may be regarded as well settled that the lessor, by the contract of letting, may reserve to himself the right to look for the payment of his rent and the preservation of his property to the person to whom he leased, rather than to be compelled to rely on any reckless, irresponsible person that his tenant may see proper to shift upon him.

But it is said the assignment complained of by appellee was not made by the lessee, but by the lessee's assignee, and the lease conferred only a right of re-entry in case the lessee or his legal representatives should assign the lease without the consent of the lessor. It is not denied that Gonzalez, the original lessee, was bound to perform all the terms and conditions of the lease. Russell, by the assignment and acceptance indorsed on the lease, became obligated to perform all the terms and conditions of the lease in as full and complete a manner as the original lessee. By reference to the written consent of the lessor that the lessee might assign the lease to Russell, the lessor expressly stipulated that no further assignment should be made without his written consent, and Russell, the assignee, in consideration of the consent of the lessor to

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Opinion of the Court.

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the assignment, expressly agreed to perform all the covenants and conditions of the lease. By the assignment Russell assumed the position of the original lessee, and was substituted to his rights. He had the same powers of the original lessee, and no other. He might assign the lease to another with the consent of the lessor, but without that consent he could make no assignment without incurring the risk of forfeiture.

But it is said the assignment by the lessee to Russell, and Trainor's consent to such assignment, constituted a new contract between Trainor and Russell, and did not carry with it a provision for re-entry by Trainor in case Russell made an assignment without Trainor's assent. This position is predicated on *Dumpor's case*, 1 Smith's Leading Cases, 119. In speaking of this case, Washburn, in his work on Real Property, (vol 1, p. 472, 4th ed. note,) says: "*Dumpor's case* has always been, it is believed, a stumbling block in the way of the profession, and a writer of much discrimination, in an article in 7 Am. Law Rev. 616-640, assumes that the case was originally 'without foundation in the law of conditions;' 'was without subsequent confirmation by decision' until *Brummell v. McPherson*, 14 Ves. 173; that 'it had no greater claim to be recognized at that time as settled law than any other venerable error;' that 'since that recognition it has, with hardly an exception, been confirmed by no decision,' and has been, with almost entire uniformity, disapproved of in regard to the doctrine it propounds, and that 'the idea on which it was actually founded has been entirely controverted by modern decisions.'"

In the *Dumpor case* it was held that a condition not to alien without license is determined by the first license granted. But the provision against the assignment, in that case, was entirely different from the clause in the contract under consideration. There the proviso was that the lessee or his assigns should not alien to any person or persons without the special license of the lessors, and the lessors afterwards licensed the

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Syllabus.

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lessee to alien the land to any person or persons. Here the license to assign was expressly limited to a particular person, O. G. F. Russell, and on the condition that no further assignment of the lease should be made without the written assent of the lessor, and in addition, Russell, the assignee, covenanted that on consideration of the license he would perform all the covenants and conditions of the original lease to be kept and performed by the lessee. There is such a wide difference between the case cited and the case under consideration that we do not regard the former case one which should control here, even if we were inclined to follow the *Dumpor case*. We perceive no reason why the rule that a license once granted removes the condition, may not be controlled by the contract of the parties. The stipulations in the first assignment are plain, and we see no reason why they did not carry with them the provisions for re-entry contained in the lease for a violation of its provisions.

The ruling of the court on instructions has been criticised, but without stopping to examine in detail each instruction given or refused, we are of opinion, after carefully examining the instructions, that the law as given by the court was substantially correct.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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JEREMIAH MARTIN *et al.*

v.

THE COMMISSIONERS OF HIGHWAYS OF SCOTLAND TOWNSHIP *et al.*

*Filed at Springfield April 2, 1894.*

1. PRACTICE IN THE SUPREME COURT—*plea of release of error—reversal on demurrer*. Where a demurrer is filed to a plea of release of errors, if the plea is held bad the judgment below must be reversed, without reference to the question whether the errors were well assigned.



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Opinion of the Court.

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2. One of the objections in the circuit court to the record of the proceedings laying out a highway was, that it did not contain a written release of damages by P., one of the land owners over whose land the road was established. To the writ of error the defendants in error pleaded that on, etc., P., by his deed of that date, released to them "any and all errors in the record and proceedings aforesaid, so far as the same relate to him:" *Held*, that the plea was clearly bad on demurrer, and that P., not being a party to the writ of error, could not release errors assigned by the plaintiffs in error.

WRIT OF ERROR to the Circuit Court of McDonough county;  
the Hon. CHARLES J. SCOFIELD, Judge, presiding.

MESSRS. NEECK & SON, and MESSRS. BAILEY & HOLLY, for the  
plaintiffs in error.

MESSRS. SHERMAN & TUNNICLIFF, for the defendants in error.

MR. JUSTICE WILKIN delivered the opinion of the Court:

This was a petition by plaintiffs in error for a common law writ of *certiorari*, to bring up the proceedings of defendants in error ordering the opening of a highway. By agreement of parties the issuing of the writ and a formal return thereto were waived, and copies of all records, files and papers attached to and made part of the petition for the writ were to be taken and considered by the court, on the hearing, as the return. At its September term, 1892, the court overruled all objections by petitioners, to the record, and entered judgment quashing the writ, and for costs. From that order this writ of error is prosecuted.

At the January term, 1894, the case standing for hearing upon our docket, the defendants in error filed a plea of release of errors, and plaintiffs in error demurred thereto. Thereupon, in pursuance of the established practice in this court, the case was taken for decision upon the plea and demurrer, and if the plea is found bad the judgment below must be reversed, without reference to the question whether the errors were well

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Opinion of the Court.

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assigned. *Page et al. v. The People ex rel.* 99 Ill. 418, and cases cited; *Beardsley v. Smith et al.* 139 id. 280.

One of the objections in the circuit court to the proceedings laying out the highway was, that it did not contain a written release of damages by Mary J. Pace, one of the land owners over whose land the road was established. The plea of release of errors avers, that on the ninth day of December, 1893, Mrs. Pace, by her deed of that date, released to the defendants in error "any and all errors in the record and proceedings aforesaid, so far as the same relate to her, as by the said deed and reference thereto will more fully appear." The plea concludes: "Wherefore they pray judgment if plaintiffs in error ought to maintain their said writ of error against them." The plea is so clearly insufficient as a release of any errors assigned in this court, that it must have been filed through inadvertence. The question here is, did the circuit court commit error in the judgment rendered by it at its September term, 1892. That question can only be determined upon the case as there presented. If error was committed on the record of the road proceeding as it then stood, (which the plea admits,) no subsequent change or amendment of that record could work a release of such error. The parties assigning errors here are Jeremiah Martin, Robert Walker, James A. Walker and Lee G. Robeson. The plea in no way connects either of them with the act of Mrs. Pace which is pleaded as a release of errors. It will scarcely be contended that Mrs. Pace, not a party, could, of her own motion, release errors assigned by plaintiffs in error.

The demurrer to the plea will be sustained, and the judgment of the circuit court reversed.

*Judgment reversed.*

## Syllabus. Statement of the case.

JOHN Q. SAVAGE, for use, etc.

v.

WILLIAM M. GREGG.

*Filed at Ottawa May 8, 1894.*

150	161
67a	131
67a	141
68a	133
150	161
77a	21
78a	408
78a	643
150	161
83a	560

150	161
182	492

150	161
199	488

1. **ASSIGNMENT**—*collection of claim by assignee.* A, the owner of a claim against a bank, made an agreement with B, an attorney, and one C, by which B was to bring suit against the bank in the name of A for the use of C, and C was to advance money to prosecute the suit and pay costs and expenses. The money was to be collected by B, and after deducting certain expenses and fees, the residue of the money was to be paid, one-half to A and the other half to C: *Held*, that C had a valid, subsisting interest, which he might properly transfer or assign to another, at least in equity, so as to enable the assignee to collect the proceeds of the claim.

2. **SAME**—*acceptance—exempt from garnishment.* Where an entire claim in the hands of an attorney for collection is sold and assigned by a debtor to his creditor, no formal acceptance by the attorney is required in order to pass the debtor's interest therein and place the same beyond the reach of garnishment by other creditors, and the fact that the claim may not be assignable at law will not prevent the debtor from making an equitable assignment of the same, which may be enforced and protected in a court of law.

3. **SAME**—*no particular form required.* In order to constitute a valid assignment of a debt or other chose in action, in equity, no particular form of words is necessary. Any words are sufficient which show an intention of transferring or of appropriating the chose in action to the assignee for a valuable consideration.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

On the 16th day of July, 1889, the law firm of Dent & Black was garnisheed by John Q. Savage, for the use of Frank W. Harding, the action being predicated upon a judgment by confession obtained by Harding against Savage for the sum of \$2203.91, rendered at the June term of the circuit court of Cook county, 1889. William M. Gregg filed an amended inter-

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Statement of the case.

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vening petition, to which the plaintiff demurred, and the court sustained the demurrer. Gregg, the intervening petitioner, electing to abide by his amended petition, the court rendered judgment against him, and on appeal to the Appellate Court that judgment was reversed.

It appears from the record that an agreement was entered into, on or about the 16th day of July, 1884, by and between George W. Savage, John Q. Savage, and Dent, Black and Cratty Bros., whereby a suit was to be commenced by Dent, Black and Cratty Bros., in favor of George W. Savage, on a claim held by him against the First National Bank of Monmouth, and that in consideration that John Q. Savage advanced certain moneys to prosecute said suit, pay expenses, etc., the said suit was to be brought in the name of George W. Savage, for the use of John Q. Savage, and all moneys collected in the suit should pass through the hands of the attorneys, and after refunding to them any advances made by them and said John Q. Savage, for legal expenses, traveling expenses, stenographers' fees and charges for printing, and also after retaining the contingent fee allowed to said attorneys, they were to divide the excess in collections between John Q. Savage and George W. Savage, equally; that the collection was made by the attorneys July 16, 1889, and that soon thereafter John Q. Savage rendered a bill to the attorneys for outlays by him paid, to be refunded to him as aforesaid, in the amount of \$430,—which amount seemed proper to be allowed to him for advances, within the agreement aforesaid; that after deducting these advancements, and other advancements, and balances due the attorneys, together with costs to be paid, including also the contingent fee of the attorneys, there was left a balance of the collection in their hands of \$2758.22, to be divided between said George W. Savage and John Q. Savage; that accordingly there was paid to the conservator of said George W. Savage the half of that amount, \$1379.11, and that there remained in the hands of the defend-

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Statement of the case.

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ant in garnishment \$1809.11, which is made up of the \$430 due to John Q. Savage for advancements which he made for costs and expenses, and the sum of \$1379.11 as his share of the net proceeds of collections out of the Savage suit against the bank. It also appears that John Q. Savage sold his interest in the claim against the bank, to William M. Gregg, by a contract in writing, as follows:

*"CHICAGO, May 6, 1885.*

"For value received, I, John Q. Savage, do hereby assign, transfer and set over to William M. Gregg, of Chicago, Illinois, and to his heirs and assigns, all my interest in certain claims and demands in favor of George W. Savage against the First National Bank of Monmouth, Illinois, for the recovery of which, suit has been brought in the name of said George W. Savage, for my use, in the Circuit Court of the United States for the Northern District of Illinois. My interest aforesaid hereby assigned is more particularly specified in a certain writing executed by said George W. Savage and myself, whereby Dent, Black and Cratty Bros. were retained to conduct legal proceedings to recover the moneys due said George W. Savage, and the said Dent, Black and Cratty Bros. are hereby requested to recognize said William M. Gregg as my assignee, and to give full effect hereto in his behalf, placing him in my stead as to any moneys which may, under said agreement, become due to me at any time hereafter.

J. Q. SAVAGE."

It also appears that at the time the assignment was made Savage was indebted to Gregg in the sum of \$1400, and the assignment was to be held as security for said indebtedness; that afterwards Gregg advanced Savage other sums of money, as loans, on the agreement that the assignment should be held as security for such advances. It also appears that a subsequent arrangement was made, under which Gregg released certain indebtedness he had against Savage, and Gregg agreed, in writing, to pay the wife of Savage one-half of whatever

amount he might receive from said claim, and that \$200 has been paid her under that agreement. It also appears that Dent & Black and the assignee of the bank had notice of the assignment to Gregg.

Mr. JOHN M. HAMILTON, for the appellant:

In order to make a valid equitable assignment, the assignor must be the owner of the legal title to the chose in action. Therefore, no such thing or title is known, at common law, as an assignee of a naked chose in action making an assignment of the same to still another assignee, unless in case of negotiable instruments, the title to which passes by assignment and delivery. Bouvier's Law Dic. title "Chose in Action."

Choses in action which may be assigned are limited to debts due or to become due to the assignor, in the technical and strict sense of the word "debts." *Capes v. Burgess*, 135 Ill. 67.

The assignment is not good as to garnisheeing creditors, for the reason it was not accepted by the attorney holding the claim. *Reeve v. Smith*, 113 Ill. 52; *Ray v. Faulkner*, 73 id. 469; *Glover v. Wells*, 40 Ill. App. 350; *First Baptist Church v. Hyde*, 40 Ill. 150.

Messrs. REED, BROWN & ALLEN, for the appellee:

A chose in action is capable of equitable assignment. The test is, whether the assignor has entirely parted with his interest in the thing assigned. *Carr v. Waugh*, 28 Ill. 418; *Koch v. Quick*, 29 Ill. App. 535; *Glover v. Wells*, 40 id. 350; *Home v. Booth*, 22 id. 385; *Phillips v. Edsall*, 127 Ill. 547; *Perkins v. Hadsell*, 50 id. 216; *Morris v. Klancy*, 51 id. 451.

Nor is the chose in action so equitably assigned liable to garnishment. *Dressor v. McCord*, 96 Ill. 389; *Chatroop v. Borgard*, 40 Ill. App. 279; *Carr v. Waugh*, 28 Ill. 418; *May v. Baker*, 15 id. 89; *Webster v. Steele*, 75 id. 545.

The right of the attaching or garnisheeing creditor is the exact right of a judgment debtor. He stands in the shoes of

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Opinion of the Court.

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the judgment debtor, and unless there could be a recovery by the judgment debtor against the garnishee, there could be no recovery in favor of the attaching or garnisheeing creditor. *Capes v. Burgess*, 135 Ill. 67; *Chatroop v. Borgard*, 40 Ill. App. 279.

A chose in action, or even a mere possibility, expectancy, or a thing not *in esse*, are assignable. Am. and Eng. Ency. of Law, 830, 831, and notes in cases cited.

In order to constitute a valid and binding assignment it is not necessary that the payee shall accept the same. A mere notice is sufficient. 1 Am. and Eng. Ency. of Law, 835, 836, 837, and notes in cases cited.

Mr. JUSTICE CRAIG delivered the opinion of the Court :

It is not claimed that the assignment of the claim which Savage made to Gregg was fraudulent, or made for the purpose of preventing the creditors of Savage from reaching the fund to be collected from the bank, but, on the other hand, it is apparent that Gregg took and held the assignment for the purpose of securing a *bona fide* indebtedness due and owing from Savage to him. The controversy is, therefore, one between creditors, and it is first claimed by counsel for appellant that John Q. Savage never had or passed the legal or equitable title to any chose in action against the bank,—in other words, he had no assignable interest in the claim against the bank,—and hence the pretended assignment to Gregg passed no title or interest in the fund ultimately collected by Dent & Black from the bank. We do not concur in this view. George W. Savage held a claim against the First National Bank of Monmouth. An arrangement was made between him, Dent & Black, and Cratty Bros., and John Q. Savage, on which a suit was brought on the claim in the name of George W. Savage, for the use of John Q. Savage. Money had to be advanced to prosecute the suit and pay costs and expenses, and

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Opinion of the Court.

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John Q. Savage agreed to make the advances. The money was to be collected by Dent & Black, and after deducting certain expenses and fees, the residue was to be paid, one-half to George W. Savage and the other half to John Q. Savage. Under this arrangement John Q. Savage became the equitable owner of one-half of the claim against the bank, which he had the right to prosecute to final judgment, and after the money should be collected, if Dent & Black had refused to pay it over to him, no reason is perceived why he could not maintain an action in his own name to recover the money. Here was a valid, subsisting interest,—one which might properly be transferred or assigned to another, at least in equity, so as to enable the assignee to collect the proceeds of the claim:

*Capes v. Burgess*, 135 Ill. 67, cited by counsel, does not seem to sustain their view of the question. What claims might be assigned did not arise in that case and was not decided. The question there was as to the nature of the claims which might be attached or garnisheed.

It is also claimed that the assignment of the claim was never accepted by Dent & Black or the bank, and upon this ground Gregg is not entitled to hold the money, and in support of this position we are referred to *First Baptist Church v. Hyde*, 40 Ill. 150. An examination of the case cited will establish the fact that the question there involved was entirely different from the one presented by this record. There an order for a certain sum of money was drawn by a contractor on a church, which the church never accepted, and it was held that the order did not constitute a transfer of the debt to the payee of the order. If Gregg had received an order from Savage on Dent & Black, for a certain sum of money, and Dent & Black had refused to accept the order, the case cited might be relied on as authority to support appellant's position. But no order was given in this case, and no question in regard to an order is involved. Here, Savage held a claim against a bank. He had a suit pending to recover the amount of his



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Opinion of the Court.

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demand, and he assigned his entire interest in that demand to William M. Gregg, and after the assignment Gregg was recognized by Dent & Black, in whose hands the demand had been placed for collection, as the owner of the claim, and at the request of the attorneys he advanced money to assist in the collection of the claim. From the time the assignment was made, whatever interest Savage had in the claim passed at once to Gregg.

*Reeve v. Smith*, 113 Ill. 47, has also been cited as an authority for appellant. There the construction of section 37 of the Attachment act arose, and it was merely held that two judgments rendered at the same term of court were entitled to share *pro rata* in the proceeds of property attached or garnisheed, although one of the actions had been instituted after the attaching debtor had transferred, by assignment, the claim garnisheed, to another creditor. The decision in that case can have no bearing here.

*Ray v. Faulkner*, 73 Ill. 469, has also been cited, but that case merely holds that the acceptance by a debtor of an order drawn upon him by his creditor, in good faith, before the service of garnishee process, makes him no longer the debtor of the drawer, and hence not liable to be garnisheed by his creditors. But the case does not hold that a claim may not be sold and assigned in good faith, and thus pass beyond the reach of garnishee process.

We do not think, where the entire claim or demand has been sold and assigned, as was done in this case, any formal acceptance was required on behalf of Dent & Black,—the parties who were to collect and distribute the demand against the bank. It may be conceded that the claim or demand held by Savage against the bank was not assignable at law, but that would not prevent Savage from making an equitable assignment of the claim, which may be protected and enforced in a court of law. This court is fully committed to that doctrine.

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Opinion of the Court.

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In *Morris v. Cheney*, 51 Ill. 451, in discussing the question, the court said: "The doctrine is well settled that courts of law will recognize and protect the right of the assignee of a chose in action, whether the assignment be good at law or in equity only, and in *Carr v. Waugh*, 28 Ill. 418, this court said, that in equity all contracts and agreements may be assigned and will be protected, and the interest of the assignee will constitute a defense to a proceeding in garnishment. \* \* \* Even if there was no formal written assignment of this claim, nothing is shown to prove a sale of it by a person authorized to make it, and it has not been repudiated by the parties in interest. It is true, a debt, or chose in action is not generally assignable in law, except in the case of negotiable instruments, and for that reason the assignee is ordinarily compelled to seek redress against the assignor and debtor solely in courts of equity." So in *Hodson v. McConnell*, 12 Ill. 170, it is said: "The doctrine is well settled that courts of law will notice and protect the interests of the equitable owners of choses in action, and particularly so in the matter of a garnishee proceeding, which is of an equitable character." See, also, *Dressor v. McCord*, 96 Ill. 389.

In order to constitute a valid assignment of a debt or other chose in action, in equity, no particular form of words is necessary. Any words are sufficient which show an intention of transferring or appropriating the chose in action to the assignee for a valuable consideration. 1 Am. and Eng. Ency. of Law, 834, and cases cited in notes.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## Syllabus.

## THE CITY OF BEARDSTOWN

v.

LOU SMITH.

*Filed at Springfield May 7, 1894.*

150	169
59a	678
150	169
d91a	*291
150	169
f95a	*130
150	169
208	*879
108a	*458

1. **STREET CROSSINGS**—*duty of city to keep in repair.* This court is not prepared to hold that the duty of a city to keep its street crossings in a reasonably safe condition for the use of foot-passengers arises only when it sees fit, in the exercise of its discretion, to construct an artificial crossing over the street.

2. Where a street crossing has been established *de facto* by public use, the city is not at liberty, merely because no artificial crossing has been constructed, to intersect the crossing which the public have established for themselves, with dangerous ditches and pit-falls.

3. **SAME**—*cutting ditch across traveled pathway.* Where no sidewalk is made along a street, but there is a well-defined path along the side of such street, used by the public, and the city causes a ditch or drain to be dug in a cross-street intersecting such traveled pathway, it will become the duty of the city to keep the crossing of such path in a reasonably safe condition and repair for the use of pedestrians, in order to escape liability to one injured while attempting to cross the same.

4. While a city may, perhaps, not be chargeable with negligence for omitting to make a proper crossing of a street, yet if it sees fit to construct a ditch in the street it will be bound to use reasonable care to so construct and maintain it as to make it reasonably safe, in view of such uses as were being actually made of the street.

5. **SAME**—*degree of care required of persons using the same.* In an action against a city to recover for a personal injury from a defective or unsafe street crossing, an instruction for the plaintiff, merely holding that a person passing over a sidewalk or street is not bound to use more than reasonable care and caution in respect to his own safety, does not require of the plaintiff a lower degree of care and diligence than the law prescribes, and is not erroneous.

6. **NEGLIGENCE**—*degree of care required of plaintiff.* In an action based on negligence, to recover for a personal injury, the defendant asked and the court refused an instruction, that "if the jury find, from the evidence, that the plaintiff was guilty of any negligence, however slight, which contributed to the alleged injury complained of, then the jury must find for the defendant, unless the jury further find, from the evidence, that the defendant was guilty of negligence, which, in comparison with the plaintiff's, was gross:" *Held*, clearly erroneous,

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Syllabus.

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as requiring proof that the plaintiff was in the exercise of the highest degree of care.

7. A person injured by the negligence of another can not recover therefor, unless he, at the time, was in the exercise of reasonable and ordinary care for his own safety.

8. *SAME—personal injury—measure of damages.* In an action for a personal injury, when the only special damages claimed in the declaration cover only the hindrance to the plaintiff's business and expenses in being cured, evidence of what she could have made by a special arrangement to go into the business of dressmaking, is not admissible.

9. To show the ability and capability of the plaintiff to labor and carry on business, in order to ascertain what is a fair compensation for its prevention, is to show the reasonable value of her labor in her business. When it is of a kind that is paid in wages, the usual amount per day, week or month is easily ascertainable as a fact; but in another case it is a matter of opinion, and opinion is as competent evidence in such cases as is knowledge in the others.

10. *EVIDENCE—admissibility—waiver of objection.* The plaintiff in an action for a personal injury testified, that prior to the injury she was receiving fifty cents a day for her work, but had made arrangements to go into business for herself, by which she could have made \$2.50 per day for her work. The last statement was admitted, over the defendant's objection. The plaintiff, in reply to the question, "You may state what you could have earned if it had not been for this accident," testified, "I could have earned \$2.50 per day," to which there was no objection, and the defendant accepted the statement and cross-examined upon it, as competent, without any inquiry as to the special arrangement: *Held*, that this might be considered as an abandonment of the objection.

11. *INSTRUCTIONS—inapplicable to the case on trial.* Where the negligence charged against a city was not in failing to construct a proper crossing, but in digging and maintaining an open ditch across a path in a street which was used by the public, an instruction laying down the proposition, that the question whether a street crossing should or should not be constructed was left to the city authorities, and the city had a discretion in such matters with which the courts would not interfere except when abused, and that until the city exercised its discretionary power by constructing a street crossing, or allowing it to be constructed, it was not liable for damages resulting wholly from the absence of such street crossing, is properly refused, as being inapplicable to the case before the jury.

12. *NEW TRIAL—conversation of a party to the suit with a juror.* During the trial of a suit, and as the court took a recess for dinner, the plaintiff and one of the jurors walked together part of the way from

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Opinion of the Court.

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the court house to the hotel, where both were boarding, and while so walking, engaged in a conversation.. It was shown that the distance between the court house and hotel was but a few steps, and that the juror's overtaking the plaintiff was purely accidental, and that nothing was said between them in relation to the suit: *Held*, that while this conduct was improper, it was not sufficient ground for a new trial.

13. **ASSIGNING ERROR**—*for ruling of court conceded by party complaining to be correct, on trial.* A party can not successfully assign for error the giving of an instruction laying down a rule substantially identical with the one laid down, or distinctly affirmed or recognized, in an instruction given at his own request.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Cass county; the Hon. LYMAN LACEY, Judge, presiding.

Messrs. MILLS & McCLURE, for the appellant.

Messrs. BAILEY & HOLLEY, for the appellee.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was an action on the case, brought by Lou Smith against the city of Beardstown, to recover damages for a personal injury received by the plaintiff in consequence of falling into an open ditch or drain in Adams street, one of the public streets of the city. The defendant pleaded not guilty, and at the trial the jury found the defendant guilty and assessed the plaintiff's damages at \$2250, and for that sum and costs the plaintiff had judgment. That judgment was affirmed by the Appellate Court on appeal, and this appeal is from the judgment of affirmance.

Adams street in the city of Beardstown runs from south of east to north of west, and is crossed at right angles by Fifth street. No crossing seems to have been constructed over Fifth street on the northerly side of Adams street, nor was there any sidewalk on the northerly side of Adams street along the blocks either easterly or westerly from the intersection of the two streets, but there was a beaten and continuous path along

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Opinion of the Court.

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both blocks and across Fifth street, and which was commonly used as such by foot-passengers. Several years prior to the plaintiff's injury, the city had caused a ditch or drain to be dug in Fifth street across this path, for the purpose of conducting the surface water into a sewer in Adams street. This ditch or drain, as the evidence tends to show, was some twelve or fourteen inches in depth and about two feet in width, and was floored and walled up on both sides with rock and left uncovered. Both the path and ditch were somewhat obscured by weeds. It appears that on the opposite side of Adams street, a crossing over Fifth street had been made of cinders, and that there were crossings over Adams street on both sides of Fifth street.

Between half past eight and nine o'clock in the evening of September 25, 1891, the plaintiff, accompanied by her sister, was returning to her residence from a point on the easterly side of Fifth street and north of Adams street. Her most direct route took her to Adams street, and thence westerly along the northerly side of Adams street across the ditch in question. On reaching the ditch, she failed to see it, and as a consequence stepped into it and fell and received the injuries of which she now complains.

The only assignments of error insisted upon by counsel in this court are, those which call in question the rulings of the trial court in the instructions to the jury, in the admission and exclusion of evidence, and in refusing to grant a new trial on account of the alleged misconduct of the plaintiff and one of the jurors during the progress of the trial. Complaint is made of the second, third and sixth instructions given to the jury at the instance of the plaintiff, those instructions being as follows:

2. "The court instructs the jury, that it is the duty of the defendant, the city of Beardstown, to keep its public streets, sidewalks and street crossings in a reasonably safe condition

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Opinion of the Court.

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and repair, for the safety of persons who have occasion to pass over the same.

3. "The court instructs the jury, that a person passing over a sidewalk or street is not bound to exercise more than reasonable care and caution in respect to his own safety. Until he is charged with notice to the contrary, he has a right to presume the same to be in a reasonably safe condition.

6. "The court instructs the jury, that if you believe, from the evidence in this case, that the defendant is a municipal corporation, and as such, on the 25th day of September, A. D. 1891, and prior thereto, was possessed and had control of the street and walk mentioned in plaintiff's declaration herein, then it was the duty of the defendant to keep said street and walk in reasonably good and safe repair for the safety of passengers passing along and over the same; and if you believe, from the evidence in this case, that the defendant constructed and maintained in, upon and across a part of said street a ditch or conduit substantially as charged in the plaintiff's declaration, or some count thereof, and that the same was not constructed and maintained so as to be reasonably safe for foot-passenger who had occasion to pass on and over the same, and that the plaintiff, while in the exercise of due care and caution on her part for her own safety, unavoidably fell into said ditch or conduit, and was thereby injured, and has sustained damages in consequence of such injury, then you should find the issues for the plaintiff, and assess her damages at whatever sum you may find, from the evidence in the case, she is entitled to."

The chief objection urged to the second and sixth instructions, if we understand it, is, that they attempt to lay down the rule of diligence incumbent upon the city in keeping its "streets," as distinguished from its "sidewalks and street-crossings," in repair for the use of foot-passengers. It is contended, upon the authority of the *City of Auróra v. Hillman*, 90 Ill. 61, and other like decisions, that a pedestrian has not

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Opinion of the Court.

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an equal right with one who drives a carriage, to travel in and along the driveway of a public street, and that a city is not under any obligation to keep such driveway, longitudinally, in a fit and safe condition for pedestrians.

Whether the rule sought to be derived from those decisions is a just and sound one or not, we are unable to see that, under the facts appearing in this record, it has any application here. The plaintiff was injured by falling into an open ditch or drain situate, it is true, in the roadway of Fifth street and outside of the space devoted to the sidewalk in that street. But she was not attempting to travel along the roadway longitudinally, but was crossing the street on that portion of Adams street appropriate for the street-crossing for foot-passengers. While the evidence seems to show that no artificial crossing at that point had been constructed by the city, the proof is clear and uncontradicted that there was a plain and beaten path along that side of Adams street, extending across Fifth street, and that such path was quite commonly used by foot passengers in crossing the street. Such being the facts, it is not to be supposed that the jury could have understood the word "street" as used in these instructions as having any reference to the carriage-way on Fifth street as such, but only to that portion of the street upon which there was, *de facto*, a crossing for the use of pedestrians, and across which the city had dug and allowed to remain the open ditch or drain into which the plaintiff fell and was injured.

We are not prepared to hold that the duty of a city to keep its street crossings in a reasonably safe condition for the use of foot-passengers arises only when it sees fit, in the exercise of its discretion, to construct an artificial crossing over the street. And much less are we disposed to hold that, after a street-crossing has been established, *de facto*, by public use, the city is at liberty, merely because no artificial crossing has been constructed, to intersect the crossing which the public have established for themselves, with dangerous ditches and



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Opinion of the Court.

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pit-falls. We are of the opinion that, under the facts which the evidence in the case tended to establish, the duty of the city to keep the crossing in question in a reasonably safe condition and repair for the use of pedestrians had arisen, and that there was no material error in the instructions by which that duty was sought to be declared and enforced.

But there is another sufficient reason why the defendant can not be heard to complain of the instructions given for the plaintiff laying down the rule that it was the defendant's duty to keep its public streets, etc., in a reasonably safe condition and repair, viz., that the fifth instruction given at the instance of the defendant expressly recognized the same rule. That instruction held that, while the law requires a municipal corporation to keep its streets and sidewalks in a reasonably safe condition, yet the person who travels over the streets and sidewalks has no right to recklessly walk into danger, etc. A party can not successfully assign for error the giving of an instruction laying down a rule substantially identical with one laid down or distinctly affirmed or recognized in an instruction given at his own request.

The objection urged to the plaintiff's third instruction is, that it requires of persons passing over a sidewalk or street a lower degree of care and diligence in respect to his own safety than the law prescribes. The rule undoubtedly is, that a person injured by the negligence of another, can not recover unless he, at the time, was in the exercise of reasonable and ordinary care for his own safety; and in this case, several instructions were given at the instance of the defendant, and very properly we think, holding that if the plaintiff, at the time of her injury, was not exercising ordinary care for her own safety, she could not recover. The plaintiff's third instruction merely holds that a person passing over a sidewalk or street, is not bound to exercise more than reasonable care and caution in respect to his own safety, thus admitting the duty of exercising the degree of care and caution which the

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Opinion of the Court.

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law prescribes, but merely holding that a still higher degree was not required. In this we are able to perceive no material error.

For the reasons already stated, we think there was no error in the seventh instruction given at the instance of the plaintiff, which held, in substance, that if there was a path on the northerly side of Adams street for foot-passengers, which was used by persons who had occasion to and did pass along and over the same on foot, and if the defendant constructed a ditch across such path, then it was its duty to so construct it as to make it reasonably safe for foot-passengers who had occasion to pass over the same, and if the defendant did not so construct the ditch as to make it reasonably safe, and the plaintiff, while exercising reasonable care and caution on her part, fell into the ditch and was thereby injured, the defendant was liable for the damages thereby sustained. The negligence charged is not in failing to construct a proper crossing, but in digging and maintaining an open ditch across the one which the public had established for itself. While perhaps the city would not have been chargeable with negligence if it had done nothing in the premises, that is, for mere non-feasance, yet, having seen fit to construct a ditch in the street, it was bound to use reasonable care to so construct and maintain it as to make it reasonably safe, in view of such uses as were being actually made of the street.

Complaint is made of the refusal of the court to give the following instruction:

"If the jury find, from the evidence, that the plaintiff was guilty of any negligence, however slight, which contributed to the alleged injury complained of, then the jury must find their verdict for the defendant, unless the jury further find, from the evidence, that the defendant was guilty of negligence, which, in comparison with the plaintiff's, was gross."

This instruction was clearly erroneous and was properly refused. It held that contributory negligence, however slight,

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Opinion of the Court.

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was of itself sufficient to defeat a recovery, in the absence of gross negligence on the part of the defendant. The exercise of ordinary care may be consistent with slight negligence, that is, a failure to exercise the highest degree of care, but the burden which the law imposes upon a plaintiff seeking to recover for an injury resulting from the negligence of the defendant is, to show that at the time of the injury he was in the exercise of ordinary care. This instruction, however, if given, would have cast upon the plaintiff in this case the burden of proving that she was in the exercise of the highest degree of care.

The substance of the defendant's second refused instruction was given to the jury in another instruction, and in a form quite as favorable to the defendant, and there was therefore no error in refusing that instruction. The defendant's third and fourth refused instructions laid down the proposition that the question whether a street crossing shall or shall not be constructed was left by law to the city authorities, and the city had a discretion in such matters with which the courts and juries would not interfere, except when abused, and that until the city exercised its discretionary power, by constructing a street crossing, or allowing it to be constructed, or assuming control over one already constructed, it was not liable for damages resulting wholly from the absence of such street crossing. As has already been shown, the negligence for which the recovery was had was not a failure on the part of the city to construct and maintain a crossing, and consequently these instructions related to questions not before the jury, and for that reason they were properly refused.

Objection was made at the trial to certain testimony of the plaintiff while on the stand as a witness in her own behalf, and on that point we are disposed to adopt the reasoning and conclusion of the Appellate Court, which was as follows:

"On her direct examination she was asked, 'What were you receiving for your work while you worked?' and answered, 'I received fifty cents a day while I was working for the Misses

## Opinion of the Court.

Hinton. I had made arrangements to go into business in Roodhouse for myself, by which I could have made \$2.50 per day for my work.' This last statement was objected to, and the court was asked to rule it out, but refused, and exception was taken. The next question was, 'You may state what you could have earned if it had not been for this accident,' and answered, 'I could have earned \$2.50 per day,' to which no objection was made. To the next question, 'Have you been able to earn anything since?' she answered, 'No, sir.'

"The record of her cross-examination is as follows: 'Tell this jury how you were going to earn this \$2.50 a day. A. By dressmaking. Q. Did you ever earn \$2.50 a day at dressmaking? A. Yes, sir. Q. Where at? A. In Roodhouse. Q. How much did you get when you worked by the day? A. Fifty cents. Q. You say that you could have earned more at Roodhouse? A. Yes, sir. Q. Why did you come down to work for fifty cents? A. That was because I was called home at the time my sister got married. Q. And you continued to work for fifty cents a day when you could make \$2.50 a day? A. Yes, sir; I was not ready to go into business for myself.'

"The special damages claimed in the declaration covered only the hindrance to her business, and expenses incurred to be cured. What she would have made by the special arrangement referred to in her statement was therefore not properly admissible under the pleadings. Nor was her estimate or opinion of what she would or could have so earned. It should have been ruled out on the objection made. (*City of Chicago v. O'Brennan*, 65 Ill. 160.) But it was 'necessary to inquire into the ability and capability to labor or carry on business \* \* \* prior to the injury, for it is manifest that what would be compensation would be greatly in excess of what another should recover, and inadequate to compensate still another,' as was said by the Supreme Court in *City of Joliet v. Conway*, 119 Ill. 492. To show her 'ability and capability to labor and carry on business,' in order to ascertain what would be a fair

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Opinion of the Court.

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compensation for its prevention, is to show the reasonable value of her labor in such business. When it is of a kind that is paid for in wages, the usual amount per day, week or month is easily ascertainable as a fact; but in another case it is matter of opinion, and therefore opinion is as competent evidence in such cases as is knowledge in the others. This statement objected to was not responsive to the question, and also was incompetent, not because it was an opinion as to what she could have made, but because it was what she could have made by special arrangement to go into business for herself, the loss of which would be special damage not alleged in the declaration. But the next question was without reference to any special arrangement—'how much could you have earned if it had not been for the accident,'—and the answer was the same, \$2.50 per day. No objection was made to this question or answer. Counsel accepted it and cross-examined upon it, as general and competent, without any inquiry as to the special arrangement, what it was, whether partnership or not, how much capital it required and how much she had, or anything else in relation to it. This may be considered as an abandonment of the objection, since the statement complained of was the same as the answer which was received without objection, and could do no more harm. Nor do we think that the jury could have been influenced by either. The fact she stated was, that she worked by the day and got fifty cents for it, while her opinion was, that if she had gone into business for herself, with the necessary capital and ability to conduct it, without any experience, she could have made out of that capital, labor and ability as much as \$2.50 per day, but she was called home by the marriage of her sister and was not ready to go into business for herself, whether because of her injury, or want of the necessary capital, or what other reason, if any, does not appear. It is not to be presumed that such an opinion of a party to the suit, in her own interest, could have had

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Opinion of the Court.

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any weight with the jury, as against the fact that in her actual business she received only fifty cents a day."

It was shown by affidavit, on motion for a new trial, that while the trial was in progress, and as the court took a recess for dinner, the plaintiff and one of the jurors walked together a part of the way from the court house to the hotel where both were boarding, and that while so walking together, they were engaged in conversation with each other. Conduct of this character between a party to a suit and juror during the progress of the trial is reprehensible, and unexplained, is usually sufficient to warrant the trial judge in setting aside the verdict and awarding a new trial. By way of explanation, however, it was shown that the distance between the court house and the hotel was but a few steps; that the juror's overtaking the plaintiff on her way to the hotel was purely accidental, and that nothing whatever was said between them in relation to the suit, but that their conversation was wholly upon indifferent matters, the subject of which neither was able to remember afterwards. In view of these explanations, we think this conduct, though improper, could not have materially prejudiced the defendant, and that it ought not therefore to be a ground for a new trial.

Some other points are raised which we have duly considered, but which we do not think require comment further than to say, that we are satisfied with the disposition made of them by the Appellate Court.

As we find no substantial error in the record, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## Syllabus.

## JONATHAN CARLTON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Filed at Mt. Vernon May 5, 1894.*

1. **CRIMINAL LAW**—*proof necessary to conviction.* The proof of the charge in criminal cases involves the proof of two distinct propositions: First, that the act itself was done; and secondly, that it was done by the person charged, and by none other,—in other words, proof of the *corpus delicti*, and of the identity of the prisoner.

2. **SAME**—*circumstantial evidence—its sufficiency.* What circumstances amount to proof of an offense can never be matter of general definition. The test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt.

3. In order to warrant a conviction of crime on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged.

4. Among the circumstances which may be judicially considered as leading to important and well-grounded presumptions, are motives to crime, declarations or acts indicative of guilty consciousness, or intentions and preparations for the commission of crime.

5. **SAME**—*instruction as to circumstantial evidence.* At the trial of a criminal case the court refused an instruction asked by the defendant, which was as follows: "The jury are instructed, as matter of law, that where a conviction for a criminal offense is sought on circumstantial evidence alone, the People must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely inconsistent, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any other theory than that of the guilt of the accused; and in this case, if all the facts and circumstances relied on by the People to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, they should acquit him:" Held, properly refused, as being too broad and sweeping in its terms.

6. **SAME**—*degree of proof required.* The jury should be satisfied of the defendant's guilt beyond a reasonable doubt, and if there be no

150	181
158	583

150	181
173	62

150	181
189	417

150	181
101a	*581

150	181
198	*187
198	*194

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200	113

150	181
210	*257

150	181
214	*178

150	181
214	*178

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Syllabus.

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probable hypothesis of guilt consistent with the facts of the case, the defendant must be acquitted.

7. *SAME—reasonable doubt explained.* While a reasonable doubt is difficult to define accurately, all the authorities agree that such a doubt must be actual and substantial, as contradistinguished from a mere vague apprehension, and must arise out of the evidence. The jury may be said to have a reasonable doubt when, after the entire comparison and consideration of all the evidence, they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

8. Proof "beyond a reasonable doubt" is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. The two phrases, "proof beyond a reasonable doubt," and "proof to a moral certainty," are synonymous and equivalent. Each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfy them as to leave no other reasonable conclusion possible.

9. *SAME—instruction as to reasonable doubt.* On the trial of one for arson, the court instructed the jury that "the reasonable doubt the jury are permitted to entertain, must be as to the guilt of the accused on the whole of the evidence, and not to any particular fact in the case." *Held*, that the instruction was not erroneous.

10. *CRIMINAL LAW—ARSON—of the proof necessary.* On an indictment for arson it is necessary for the People to prove that the building described was burned by the accused, and that such burning was done with felonious intent, or, in the language of the statute, "willfully and maliciously."

11. In arson, the main fact required to be proved, in the first place, is the burning of the building, and when that is shown, then it is necessary to show how the act was done, and by whom, in order to convict the accused. When the general fact is thus proved, a foundation is laid for the introduction of any legal and sufficient evidence that the act was committed by the accused, and that it was done with a criminal intent. Such evidence need not be direct and positive, but may be circumstantial in its character.

12. *SAME—admissible evidence—foot-prints.* On the trial of one for arson in the burning of a barn, evidence of the foot-prints near the barn, or leading to and from it, and their correspondence with the defendant's feet, is competent; and though not, by itself, of any independent strength, it is admissible with other proof, as tending to make out a case.



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Syllabus.

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13. *SAME—threats of a third person.* On the trial of one for the burning of a barn, the defendant offered to prove by witnesses that they had heard a third person make threats that he would burn up everything the prosecutor had, which was not admitted: *Held*, that the proposed testimony was mere hearsay, and was properly excluded.

14. It is competent for the accused to show, by any legal evidence, that another committed the crime charged to him, and that he had no participation in it. But this can not be shown by the admissions or confessions of a third person not under oath, which are only hearsay. The proof must connect such third person with the fact,—that is, with the perpetration of some deed entering into the crime itself. There must be proof of such a train of circumstances as tend clearly to point to him, rather than to the prisoner, as the guilty party.

15. *SAME—alibi—burden of proof.* The burden of proof of an *alibi* in a criminal case is upon the accused, and in order to maintain that defense he is bound to show, in its support, such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him.

16. *REASONABLE DOUBT—how determined—alibi.* The reasonable doubt which will acquit a prisoner when his defense is an *alibi*, is the doubt of guilt which arises from a consideration by the jury of all the evidence, as well that touching the question of the *alibi* as the incriminating evidence introduced by the prosecution.

17. *EVIDENCE—hearsay—res gestæ.* Extra-judicial statements of third persons can not be proved by hearsay, unless such statements are part of the *res gestæ*.

18. *INSTRUCTIONS—need not be repeated.* A defendant can not complain of the refusal of an instruction if its substance is embodied in instructions which are given, and in so holding this court does not necessarily hold such given instructions to be correct.

WRIT OF ERROR to the Circuit Court of Johnson county; the Hon. A. K. VICKERS, Judge, presiding.

Messrs. MORRIS & MOORE, and Mr. S. A. VANKIRK, for the plaintiff in error.

Mr. M. T. MOLONEY, Attorney General, and Mr. GEORGE B. GILLESPIE, State's Attorney, for the People.

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Opinion of the Court.

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Mr. JUSTICE MAGRUDER delivered the opinion of the Court :

This is an indictment against the plaintiff in error for arson. The indictment charges him, in the usual form, with setting fire to and burning the barn of one Rob Roy Ridenhour. The jury found him guilty, and fixed his punishment at imprisonment in the penitentiary for a term of four years. Motions for new trial, and in arrest of judgment, were made and overruled. Judgment was rendered, and sentence pronounced, in accordance with the verdict.

On the afternoon of Saturday, April 9, 1892, plaintiff in error was arrested for the violation of a town ordinance at Vienna in Johnson County, by the town marshal, assisted by one of the deputy sheriffs and also by the said Ridenhour. He was taken to the county jail in an intoxicated condition, having a knife in his hand and a revolver in his pocket. He and Ridenhour each lived in the country about four and a half miles from Vienna, and had ridden into town together on the morning of that day. His arrest was made with difficulty and after a scuffle. By direction of Ridenhour his knife and revolver were taken away from him. While he was lying upon his back in the hall-way of the jail, his arms and feet being held by those who arrested him, he said: "Oh, yes! Bob Ridenhour, you live in the country, and you will think of this, god damn you, when your barn is on fire." He repeated the remark several times, varying the expression, saying, according to one witness: "you will think of this when you see your barn in flames;" according to another: "you will think of this when your barn is burned; your barn is on a high hill, it will look well when it is burning." He was released from jail between 10 and 11 o'clock on the night of that same day, and left town about 11 o'clock in company with Thomas Verhines and Edward Hogg, each of the three riding on horseback. The plaintiff in error stopped on the way at the house of Mrs. Bridges, and obtained some matches. They rode together

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Opinion of the Court.

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about a mile when they separated, Verhines going east and Carlton and Hogg going south. Plaintiff in error and Hogg continued to ride together about a mile further, when they separated, the former going southeast and the latter going southwest; the home of Carlton was about 2 miles, and that of Hogg about  $2\frac{1}{2}$  miles, from the point where they separated. In going to his home from this point plaintiff in error would pass in sight of Ridenhour's house. Ridenhour's barns were burned that night. He says that he went to bed between 10 and 11 o'clock, and that it was after midnight when he first saw the fire. On the next day, Sunday, April 10, an examination was made of the premises. Tracks were found south of the barn in a path leading to the highway, which ran in the general direction of the house of plaintiff in error. Mud was found upon the fence at the corner of the field, indicating that some one had climbed over the fence. The oats in the field had not come up. An examination of the tracks showed, that one foot had made a deeper impression than the other. Carlton was arrested on that Sunday afternoon. A measurement of the tracks showed, that they corresponded in length with tracks made by Carlton in the road on that day, and with the shoes worn by him on that afternoon. It was proven, that he was lame and walked with "a kind of hop." One of the witnesses says: "the foot he limped on corresponded to the irregular tracks in the field." Two barns were burned, containing corn, hay, mules and horses. The horses escaped, but one of the mules was burned to death, and the corn and hay were destroyed. Hogg says that he saw no fire when he passed with Carlton.

The only evidence introduced on the defense seems to have had for its object the proof of an *alibi*. The testimony tends to show, that the barns were on fire after midnight and somewhere about one o'clock, though one of the witnesses says he saw the fire at 4 o'clock in the morning, and, when he saw it, went to it from his house, a half mile distant, and found the

## Opinion of the Court.

barns "pretty well all burned down." The evidence does not certainly fix the hour when the plaintiff in error reached his home on the night of the fire. His mother swore, that "it was about twelve o'clock or near that." One of his sisters swore, that she heard the clock strike 12, and another that she heard it strike one, after his arrival.

Counsel for plaintiff in error make the general objections, that there is an absence of evidence relative to the *corpus delicti*, and that the evidence is purely circumstantial. "The proof of the charge in criminal causes involves the proof of two distinct propositions: first, that the act itself was done; and, secondly, that it was done by the person charged, and by none other;—in other words, proof of the *corpus delicti*, and of the identity of the prisoner." (3 Greenl. on Ev. sec. 30.) Here, the act done, which was to be proven, was the burning of the barn. It was also required to be proven, that the barn was burned by the plaintiff in error, and that such burning was done with felonious intent, or, in the language of the statute, "willfully and maliciously." (1 Starr & Cur. Ann. Stat. page 759; 3 Greenl. on Ev. secs. 55, 56.) It has been said that, in *arson*, the *corpus delicti* consists not only of the fact that a building has been burned, but also of the fact that it has been willfully fired by some responsible person. (*Winslow v. The State*, 76 Ala. 42.) The main fact, however, which is to be proven in the first place, is the burning of the building. When that fact is established, then it is necessary to show how the act was done, and by whom. We think that, in the present case, the fact that the barns were burned was clearly and satisfactorily proven; and the circumstances were such as to exclude accident, or natural causes, as the origin of the fire. When the general fact is thus proved, a foundation is laid for the introduction of any legal and sufficient evidence, that the act was committed by the accused, and that it was done with criminal intent. (*Sam v. The State*, 33 Miss. 347; *Phillips v. The State*, 29 Ga. 105.) Such evidence need not be direct and positive, but may

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Opinion of the Court.

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be circumstantial in its character. (*Winslow v. The State, supra.*) In both criminal and civil cases, "a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce." (1 Greenl. on Ev. sec. 13a.)

After a careful examination of the evidence in this case, we are not prepared to say that the jury were not warranted in finding the verdict returned by them. Among the circumstances which may be judicially considered as leading to important and well grounded presumptions, are "motives to crime, declarations or acts indicative of guilty consciousness or intention, preparations for the commission of crime." (Wills on Circum. Ev. page 39). It appears from the facts above recited, that there was evidence here, which tended to show the existence of just such circumstances as are thus indicated, revenge for arrest and imprisonment, threats that the barns would be burned, halting on the way to obtain matches. The evidence of the foot-prints and their correspondence with the defendant's feet was competent, and, though "not by itself of any independent strength, is admissible with other proof as tending to make out a case." (Wharton's Crim. Ev.—8th ed. sec. 796). In *Winslow v. The State, supra*, where the indictment was for *arson*, and "there was evidence tending to show a fresh track in the lane leading from the road to the house; (and) that this track, and the track of the defendant, corresponded," it was said: "The previous threats of the defendant, and his declarations in the nature of threats, were, on the same principle, properly admitted. While they are not of themselves convincing of guilt, from them, in connection with the other circumstances, if believed by the jury, guilt may be a logical sequence." (Wharton's Crim. Ev.—8 ed.—sec. 756).

As to the defense of an *alibi* the burden of making it out was upon the plaintiff in error, (*Ackerson v. The People*, 124 Ill. 563), and, in order to maintain it, he was bound to es-

## Opinion of the Court.

tablish in its support such facts and circumstances as were sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him. (*Garity v. The People*, 107 Ill. 162; *Mullins v. The People*, 110 id. 42). It cannot be said, that the defense was made out so clearly and satisfactorily as to be availing against the case made by the State.

It is assigned as error, that the court refused to permit the defendant to prove by two witnesses, that they had heard Thomas Verhines make threats that he would burn up everything Ridenhour had. We do not regard this ruling as erroneous. Threats of a third person, other than the prisoner on trial, against the victim of the crime charged are mere hearsay, and are inadmissible. Evidence of this character tends to draw away the minds of the jury from the point in issue, which is the guilt or innocence of the prisoner, and to excite their prejudices and mislead them. (1 Greenl. on Ev. secs. 51, 52; *Walker v. The State*, 6 Tex. Ct. of App. 576; *State v. Duncan*, 6 Iredell, (N. C.) 236). Such threats of a third person are *inter alios acta*; they are too remote from the inquiry before the jury to be received, and have no legal tendency to establish the innocence of the prisoner. (*Alston v. The State*, 63 Ala. 178; *State v. Davis*, 77 N. C. 483). It is competent for the defendant to show by any legal evidence, that another committed the crime with which he is charged, and that he is innocent of any participation in it, but this cannot be shown by the admissions or confessions of a third person not under oath, which are only hearsay. The proof must connect such third person with the *fact*, that is, with the perpetration of some deed entering into the crime itself. There must be proof of such a train of facts and circumstances, as tend clearly to point to him, rather than to the prisoner, as the guilty party. "Extra judicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gesta*."

## Opinion of the Court.

(Wharton's Crim. Ev.—8 ed.—sec. 225; *Smith v. The State*, 9 Ala. 990; *State v. Davis*, *supra*; *Greenfield v. People*, 85 N. Y. 75; *Thomas v. People*, 67 id. 218; *Owensby v. The State*, 82 Ala. 63; *State v. Haynes*, 71 N. C. 79; *Rhea v. The State*, 10 Yerger, 258; *Commonwealth v. Chabcock*, 1 Mass. 143; *State v. Johnson*, 30 La. Ann. 921; *People v. Murphy*, 45 Cal. 137; *State v. Smith*, 35 Kans. 618; *State v. May*, 4 Dev. (N. C.) 328; *State v. Wright*, 9 Yerg. 342).

It is assigned as error, that the court instructed the jury, that "the reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not as to any particular fact in the case." We do not regard the doctrine of the instruction as erroneous. It is in accordance with the rule, which we have laid down in a number of cases. (*Mullins v. The People*, *supra*; *Davis v. The People*, 114 Ill. 86; *Leigh v. The People*, 113 id. 372; *Bressler v. The People*, 117 id. 422; *Hoge v. The People*, id. 35.

There was no error in refusing the defendant's third refused instruction, because instructions given for the State, and for the accused, required the jury to believe from the evidence beyond a reasonable doubt, that the defendant willfully and maliciously burned the barn of Ridenhour.

Complaint is made that the court refused to instruct the jury as follows: "If the jury entertain any reasonable doubt as to whether or not the defendant was at his own home, or at the scene of the alleged offense at the time such offense was committed, then it is your duty under the law to acquit him." Such an instruction was held to be incorrect in *Mullins v. The People*, *supra*. The reasonable doubt of guilt, which will acquit the prisoner, when his defense is an *alibi*, is the doubt, which arises from a consideration by the jury of all the evidence, "as well that touching the question of the *alibi*, as the criminating evidence introduced by the prosecution." (*Mullins v. The People*, *supra*.)

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Opinion of the Court.

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In the case at bar, 14 instructions were given for the State and 18 for the defendant. The jury was instructed in regard to the subject of reasonable doubt in accordance with the principles laid down by this court in *Miller v. The People*, 39 Ill. 457; *May v. The People*, 60 id. 119; *Connaghan v. The People*, 88 id. 460; *Spies v. The People*, 122 id. 1. We see no reason for departing from the views expressed in these cases.

Counsel for plaintiff in error claim, that the trial court erred in refusing to give their refused instruction, No. 17, which is as follows:

"The jury are instructed, as a matter of law, that when a conviction for a criminal offense is sought on circumstantial evidence alone, the People must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely inconsistent, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any other theory than that of the guilt of the accused; and in this case, if all the facts and circumstances relied on by the People to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, they should acquit him."

In instruction No. 13, given for the People, the court told the jury, that circumstantial evidence should be "of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty." In instruction No. 1, given for the defendant, the court instructed the jury, that "the defendant is presumed to be innocent until the contrary appears by the evidence, and such evidence must be so strong and convincing as to remove every reasonable doubt of his guilt to the exclusion of every reasonable hypothesis of his innocence." Irrespective of the question whether refused instruction No. 17 was right or wrong, the defendant could not have been injured by its refusal in view of the giving of plaintiff's instruction No. 13 and defendant's instruction No. 1, as above quoted,



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Opinion of the Court.

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whether the two last named instructions were correct or not. A defendant cannot complain of the refusal of an instruction, if its substance is embodied in instructions which are given; and, in so holding, this court does not necessarily hold such given instructions to be correct.

In addition, however, to this consideration, said instruction No. 17 was properly refused, because it is so broad and sweeping in its terms, that, if it were given in every criminal case dependent upon circumstantial evidence, it would have a tendency to prevent, in many instances, the conviction of guilty parties. (*Gannon v. The People*, 127 Ill. 507; Whart. Crim. Ev.—8th ed.—sec. 10). “What circumstances amount to proof can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt.” (1 *Starke* on Ev. sec. 79; *Otmer v. The People*, 76 Ill. 149). The circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis. (*Commonwealth v. Goodwin*, 14 Gray, 55; 1 Greenl. on Ev. sec. 13 a). The jury should be satisfied of the defendant's guilt beyond a reasonable doubt, and if there be no probable hypothesis of guilt consistent, beyond reasonable doubt, with the facts of the case, the defendant must be acquitted. (*Commonwealth v. Costley*, 118 Mass. 1; Wharton's Crim. Ev.—8th ed.—sec. 21). In order to warrant a conviction of crime on circumstantial evidence, the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty, that the accused, and no one else, committed the offense charged. (*Com. v. Goodwin, supra*). It is difficult to define accurately what is a reasonable doubt, but all the authorities agree that such a doubt must be actual

## Syllabus.

and substantial as contradistinguished from a mere vague apprehension and must arise out of the evidence introduced. (3 Greenl. on Ev. sec. 29, note a, 15th ed. ; *Earll v. The People*, 73 Ill. 329). The jury may be said to entertain a reasonable doubt, when, after the entire comparison and consideration of all the evidence, they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. (*Com. v. Webster*, 5 Cush. 320). Proof "beyond a reasonable doubt" is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. The two phrases, "proof beyond a reasonable doubt," and proof "to a moral certainty," are synonymous and equivalent. "Each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible." (*Com. v. Costley*, *supra*).

The judgment of the Circuit Court is affirmed.

*Judgment affirmed.*

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ALBERT C. BARNES, Assignee,

v.

JOHN REMBARZ.

*Filed at Ottawa May 8, 1894.*

1. PRACTICE—*special finding*—*precluding recovery on general verdict*. In an action against a manufacturing corporation to recover for a personal injury resulting from negligence, the jury found for the plaintiff, and in response to the question, "Could the plaintiff, by reasonable attention or the exercise of ordinary prudence, have known that it was dangerous to use a stick in the machine in the manner testified to by himself," answered "Yes:" *Held*, that while this finding tended to establish the fact that the plaintiff failed to exercise ordi-

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Opinion of the Court.

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nary care, it was not conclusive, and that there may have been other evidence tending to relieve the plaintiff's act of such negligence as to preclude a recovery.

2. *SAME—presumption in favor of general verdict.* All reasonable presumptions will be entertained in favor of the general verdict, while nothing will be presumed in aid of the special findings of fact. The inconsistency between the general verdict and the special findings must be irreconcilable, so as to be incapable of being removed by any evidence admissible under the issues, to warrant the court to set aside the general verdict.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

Mr. S. M. MILLARD, for the appellant.

Mr. EDMUND FURTHMAN, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by John Rembarz, against the Chicago Anderson Pressed Brick Company, to recover for a personal injury received by him while in the employ of the company shoveling clay and other material into a crusher. The accident resulted in the loss of the plaintiff's right arm, and on a trial in the circuit court, before a jury, he recovered a judgment for \$10,000, which was affirmed in the Appellate Court.

The principal part of the argument of counsel for appellant is devoted to a discussion of questions of fact. As to those questions it is only necessary to observe, that they are settled by the judgment of the Appellate Court.

No complaint is made in the argument in regard to the rulings of the court in the admission or exclusion of evidence, nor is there any fault found with the decision of the court on the instructions to the jury. It is, however, claimed, that the special findings are inconsistent with the general verdict, and for that reason the verdict should have been set aside, and

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Opinion of the Court.

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this is the only question presented for our consideration. The seventh special finding is the one claimed to be inconsistent with the general verdict. It was as follows:

"*Seventh*—Could the plaintiff, by reasonable attention or the exercise of ordinary prudence, have known that it was dangerous to use a stick in the machine in the manner testified to by himself?"—"Yes."

It may be conceded that this finding of the jury tended to establish the fact that the plaintiff failed to exercise ordinary care. But it is not conclusive. The fact found in response to interrogatory No. 7 may be regarded as a mere evidentiary fact, and nothing more. There may be, and doubtless were, facts and circumstances connected with the fact that the plaintiff used a stick in the machine, which might tend to relieve the act of such negligence as would prevent a recovery. This must have been the case, or otherwise the jury could not have found, as they did, in response to interrogatory No. 6, that the plaintiff was exercising reasonable care for his safety at the time he was injured.

In *Chicago and Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, where the question arose whether the special finding was inconsistent with the general verdict, it was held that all reasonable presumptions will be entertained in favor of the general verdict, while nothing will be presumed in aid of the special findings of fact. It was also held that the inconsistency must be irreconcilable, so as to be incapable of being removed by any evidence admissible under the issues. Under the rule announced in the case cited, there is no such inconsistency between the special finding and the general verdict as would authorize the court to set aside the general verdict.

The judgment of the Appellate Court will therefore be affirmed.

*Judgment affirmed.*

## Syllabus.

JOHN WHITTAKER *et al.*

v.

THE VILLAGE OF VENICE *et al.*

Filed at Mt. Vernon May 5, 1894.

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1. **CERTIORARI**—*object of the writ—trial by the record alone.* The object of the common law writ of *certiorari* is to bring up the record of a proceeding from an inferior to a superior tribunal. When the return is made the superior tribunal tries the case, not upon the allegations of the petition, nor upon any issue of fact, but by the record alone, and upon the inspection thereof. It is the duty of the court to determine whether the inferior court had jurisdiction, and whether it exceeded its jurisdiction, or otherwise proceeded in violation of law.

2. **SAME**—*what may be reviewed.* The act of an inferior tribunal which can be reviewed on *certiorari* by a superior tribunal, must be judicial or quasi judicial in its character. The act to be reviewed must not be legislative or ministerial.

3. The action of the board of trustees in annexing territory to a village under section 1 of "An act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," approved April 10, 1872, is not such judicial action as will authorize a review of the proceeding by *certiorari*.

4. Upon the return of the record the court has no power to form and try an issue of fact in regard to the jurisdiction of the inferior tribunal, nor to review the testimony heard below, nor to inquire into the correctness of the decision on that testimony. The trial is confined to the record, and extrinsic evidence is inadmissible.

5. **CITIES AND VILLAGES**—*annexation of territory—a question of policy.* Whether the boundaries of a city or village should be enlarged or contracted by the annexation or detaching of territory is not a question of law or fact for judicial determination, but purely a question of policy, to be determined by the legislative department.

6. **SAME**—*conditions to annexation of territory.* The conditions on which territory may be annexed to a village are: A petition in writing therefor, signed by three-fourths of the voters, and the owners of three-fourths (in value) of the property, etc., and that the territory to be annexed shall be contiguous to the village, and not embraced within its limits. When these facts exist, the board may, by ordinance, annex the territory, which ordinance is to be recorded. The legislature has not invested the board of trustees with any discretionary power to determine whether the annexation is expedient or not.

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Brief for the Appellants.

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7. SAME—*annexation—whether reviewable on certiorari.* The village board is authorized to find the facts that the territory is contiguous to the village, and that the petition is signed by the proper number of voters and owners. But the decision upon these preliminary questions of fact can not be reviewed on *certiorari*.

8. APPEALS—*jurisdiction of the Supreme Court—validity of a statute.* In a proceeding by *certiorari* to quash the proceedings of a village board of trustees in annexing territory to the village, the court was asked to hold as law that the act under which the proceeding was had was unconstitutional and void, which was refused: *Held*, that the validity of a statute was involved, and this court had jurisdiction of an appeal taken directly to it.

APPEAL from the Circuit Court of Madison county; the Hon. A. S. WILDERMAN, Judge, presiding.

Mr. JOHN G. IRWIN, for the appellants:

The circuit courts have the power to award *certiorari*, at common law, to all inferior tribunals and jurisdictions, whenever it is shown, either that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed and no other mode of reviewing their proceedings is provided. *People v. Williamson*, 13 Ill. 661; *Doolittle v. Railroad Co.* 14 id. 383; *Railroad Co. v. Fell*, 22 id. 335; *Railroad Co. v. Whipple*, 22 id. 105; *Greenvelt v. Burwell*, 1 Ld. Raym. 471.

If it is apparent from the record that the inferior tribunal has acted without, or has exceeded, its jurisdiction, or has acted contrary to law in any material matter, the practice is to quash the proceedings. *Railroad Co. v. Fell*, 22 Ill. 335.

In the cases cited below, *certiorari* has been held by this court to be the appropriate remedy to review the record of supervisors, on appeal from the decision of highway commissioners as to the laying out of a highway. *Hyslop v. Finch*, 99 Ill. 171; *Commissioners v. Supervisors*, 27 id. 141; *Gerdes v. Champion*, 108 id. 137; *McManus v. McDonough*, 107 id. 95; *Deer v. Commissioners*, 109 id. 379; *Commissioners v. Harper*, 38 id. 105.

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Brief for the Appellees.

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In the following cases *certiorari* has been held the appropriate remedy to review the proceedings of school trustees in detaching territory from or annexing it to school districts: *Potter v. Trustees*, 10 Bradw. 346; *Arnold v. Thorp*, 9 id. 357; *Miller v. Trustees*, 88 Ill. 27.

The legislature may create a tribunal to determine, at least in a *quasi-judicial* manner, the desirability of enlarging boundaries of cities, etc., by annexation, and to order the annexation if deemed advisable. *Powers v. Commissioners*, 8 Ohio St. 286; *Blanchard v. Bissell*, 11 id. 96; *In re Borough of Quakertown*, 3 Grant, 203; *In re Borough of West Philadelphia*, 5 Watts & Serg. 281; *People v. Bennett*, 29 Mich. 452.

Under the English statute providing for establishing and altering municipal boundaries, the proceedings prescribed are reviewable in the Queen's Bench by *certiorari*. *Regina v. Northowram*, L. R. 1 Q. B. 110; *Regina v. Hardy*, 4 id. 117; *Regina v. Local Gov. Board*, 8 id. 227.

Had we brought *quo warranto* in this case, it would have puzzled a Philadelphia lawyer to reconcile the following list of cases as to whether it is or is not the proper remedy: *People v. Whitcomb*, 55 Ill. 176; *Trumbo v. People*, 75 id. 564; *Murray v. Virginia*, 91 id. 558; *People v. Board of Education*, 101 id. 312; *Evans v. Lewis*, 121 id. 478; *Bodman v. Drainage District*, 132 id. 440.

Messrs. TRAVOUS & WARNOCK, for the appellees:

The motion to dismiss the appeal should be allowed. To authorize an appeal directly to this court upon the ground that the validity of a statute is involved, the question of its validity must be directly in issue and "the primary inquiry" in the case. The petition admits the validity of the section of the statute here questioned, and it is not put in issue by anything in the case. *Cairo v. Bross*, 99 Ill. 521; *Transfer Co. v. Canty*, 103 id. 423; *Pearson v. Zehr*, 125 id. 573.

## Brief for the Appellees.

It is also necessary that the constitutional question raised be one "which may be fairly regarded as debatable." The section of the statute here assailed has been in force and acted upon for twenty years, is repugnant to no provision of the constitution, and is sustained by every authority. Dillon on Mun. Corp. (4th ed.) sec. 44, note 4, p. 265, and authorities cited in notes 2 and 3; 15 Am. and Eng. Ency. of Law, 1007, 1012; *Chaplin v. Commissioners*, 126 Ill. 264; *Wulff v. Aldrich*, 124 id. 592; *People v. Reynolds*, 5 Gilm. 1; *People v. Hoffman*, 116 Ill. 594; *Murray v. Virginia*, 91 id. 558.

The act of the president and board of trustees of the village in annexing the territory in question was purely legislative, and hence not reviewable by *certiorari*. *Mayor v. Morgan*, 18 Am. Dec. 236, note; *Galesburg v. Hawkinson*, 75 Ill. 152; *Covington v. East St. Louis*, 78 id. 548; *People v. Bennett*, 18 Am. Rep. 117; *In re Salem County Subscription*, 100 Am. Dec. 337; *In re Wilson*, 32 Minn. 145; *People v. Board of Health*, 33 Barb. 334; Dillon on Mun. Corp. (4th ed.) sec. 927.

It appearing from an inspection of the record and proceedings returned, that the village authorities had jurisdiction and proceeded regularly, the writ was properly quashed. Evidence *aliunde* could not be received to contradict the return. *Deer v. Commissioners*, 109 Ill. 379; *Doolittle v. Railroad Co.* 14 id. 383; *Railroad Co. v. Fell*, 22 id. 335; *Rue v. Chicago*, 66 id. 256.

Where the boundaries of a municipality are, and whether particular territory is contiguous thereto, are questions of fact, of which courts do not take judicial notice in cases like this, where such record is conclusive, and the matters complained of determined from its inspection alone. 1 Greenleaf on Evidence, 8; *Ross v. Reddick*, 1 Scam. 73; *Indianapolis v. McAvoy*, 86 Ind. 587; *Boston v. State*, 32 Am. Rep. 575.

The writ of *certiorari* is not demandable as of right, but only issues *ex mera gratia*, and for good cause shown. Here the refusal of the court to grant the prayer of the petition



## Opinion of the Court.

worked appellants no injustice, while to have granted it would have inflicted serious injury upon others. The writ was therefore properly quashed. *Hyslop v. Finch*, 99 Ill. 171; *Turnpike Co. v. Magoun*, 8 Greenl. 292; *French v. Barre*, 28 N. H. 570; *Cobb v. Lucas*, 15 Pick. 181; *Dugger v. McGruder*, 12 Am. Dec. 527, note.

It being in the sound discretion of the court to grant or withhold the writ, evidence *dehors* was properly received to determine whether, in view of all the circumstances, substantial justice requires it. Hence, even if the village authorities had exceeded their jurisdiction or proceeded illegally in passing the ordinance annexing appellants' land, and their action was reviewable in this proceeding, still appellants could only complain of that part of the ordinance affecting them; and their land having been voluntarily disannexed, placing them *in statu quo*, before the hearing upon their petition, the writ would properly be quashed, notwithstanding such irregularities. *Rutland v. Commissioners*, 20 Pick. 71; *Water Power Co. v. Commissioners*, 112 Mass. 214; *Brewer v. Railroad Co.* 113 id. 57; *Commonwealth v. Turnpike Co.* 5 id. 420; *Gormley v. Day*, 114 Ill. 185; *Tucker's Petition*, 27 N. H. 405; 3 Am. and Eng. Ency. of Law, 66; *Quincy v. Bull*, 106 Ill. 337; *Baker v. Scott*, 62 id. 86; *Wilbur v. Springfield*, 123 id. 395.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is a petition by certain owners of land, included in territory claimed to have been annexed to the Village of Venice in Madison County, under "An Act to provide for annexing and excluding territory to and from cities, towns and villages," etc., approved April 10, 1872, (1 Starr & Cur. Ann. Stat. page 515), for a writ of certiorari, directed to said Village and the president and board of trustees thereof, and the village clerk, and the recorder of the county, commanding them to certify and bring into court a transcript of the records, documents and files relating to said annexation for the inspection of the

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Opinion of the Court.

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court; and praying that said record and proceedings may be quashed and set aside, etc. The return sets forth a copy of the petition for annexation as presented to the president and board of trustees of the village; proceedings of the board, showing that an order was entered wherein, after finding that it was made to appear to the satisfaction of the board that the facts alleged in the petition were true, it was ordered that the prayer of the petition be granted, and that an ordinance for the annexation of said territory, drawn and presented to the board, be adopted, and a copy thereof, with a plat of the territory annexed, be recorded in the recorder's office of said county; also a copy of said ordinance, and certified copies thereof and of said plat from the records of said county; also certain proceedings in relation to a plat of West Madison Addition to said Village and the approval thereof by said board; also certain proceedings, consisting of petition, certificate of county clerk, order for disconnection, ordinance for disconnection, adoption of said ordinance and order for the record thereof, in relation to the disannexing of a part of the territory so annexed. The Circuit Court rendered judgment, quashing the writ and for costs against the petitioners, to which exception was taken, and from which the present appeal is prosecuted.

*First*, a motion is made to dismiss for want of jurisdiction. The object of the common law writ of *certiorari* is to bring up the record of a proceeding from an inferior to a superior tribunal. When the return is made, the superior tribunal tries the case, not upon the allegations contained in the petition for the writ, nor upon any issue of fact, but by the record alone, and upon the inspection thereof, as such record is returned in obedience to the writ. It is the duty of the court to determine whether the inferior court had jurisdiction, and whether it exceeded its jurisdiction, or otherwise proceeded in violation of law. (*Comrs. v. Supervisors of Carthage*, 27 Ill. 140).

## Opinion of the Court.

Here, the return sets out the proceedings taken under and in pursuance of the act of the legislature above referred to, and that act is the sole authority for the annexation of the territory in question by the board of trustees of the village. This being so, the petitioners submitted, among others, the following proposition to be held as law by the court upon the hearing of the cause: "First—That the act, under which the proceedings set out in the return to the writ herein issued were had, to wit: Sec. 1 of 'An Act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages,' approved April 10, 1872, is unconstitutional, null and void, because of being an attempt to delegate legislative powers and functions to private individuals." This proposition the court refused to hold as law.

In view of the issue presented by the return to the writ, and in view of the nature of the proposition of law thus asked and refused, we think that the validity of the statute above mentioned is a question, which is legitimately presented by the record, and that, therefore, this court has jurisdiction. It follows that the motion to dismiss must be overruled.

*Second*, the act of an inferior tribunal, which can be reviewed on *certiorari* by a superior tribunal, must be judicial or quasi-judicial in its character. (*Comrs. v. Griffin*, 134 Ill. 330.) The acts of officers of municipal corporations must be plainly judicial in character, in order to justify an interference with them by *certiorari*. (Wood on *Certiorari*, pages 148-149; *In the matter of Mount Morris Square, etc.* 2 Hill, 14.) The act to be reviewed by the writ must not be legislative or ministerial. (*Comrs. v. Griffin, supra.*) Whether the boundaries of a city or village should be enlarged or contracted is not a question of law or fact for judicial determination, but purely a question of policy to be determined by the legislative department. (*The City of Galesburg v. Hawkinson*, 75 Ill. 152; *Covington v. E. St. Louis*, 78 id. 548.) The annexation of territory to a

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Opinion of the Court.

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municipal corporation, and the extension of its boundaries to include the same, are matters which are subject to legislative control, in the absence of constitutional restriction. (1 Dill. on Mun. Corp. sec. 126, 2d ed.)

Section 1 of the act of 1872 provides, that, on petition in writing signed by not less than three-fourths of the legal voters, and by the owners of not less than three-fourths (in value) of the property in any territory, contiguous to any city or incorporated village or town, and not embraced within its limits, the city council or board of trustees of said city, village or town, (as the case may be), may, by ordinance, annex such territory to such city, village or town, upon filing a copy of such ordinance, with an accurate map of the territory annexed, (duly certified by the mayor of the city, or president of the board of trustees of the village or town) in the office of the recorder of deeds in the county where the annexed territory is situated, and having the same recorded therein.

In this statute, the legislature has named the conditions, upon which territory may be annexed to a village. These conditions are, that a petition in writing for the annexation must be signed by three-fourths of the legal voters; that it must be signed by three-fourths (in value) of the owners, etc.; that the territory to be annexed must be contiguous to the village, and not embraced within its limits. When these facts exist, the board of trustees may accomplish the annexation, by passing an ordinance therefor and recording the same, together with a map of the territory, in the recorder's office; but the board is not authorized to determine, by the exercise of its own judgment or discretion, whether it is wise or unwise, or whether it is good or bad policy, to make the annexation. The legislature could have clothed the board with such discretionary power, but it has not seen fit to do so. On the contrary, having complete control over the subject, the legislature has determined in advance, that the existence of the facts stated settles the question of the advisability of the annexation. The only func-

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Opinion of the Court.

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tion of the board is to see to it that the territory is located as the statute prescribes, and that the petition is signed as the statute directs.

It is quite manifest, that the action of the board of trustees of a village under section 1 is not such judicial action, as will authorize a review of the proceeding by *certiorari*. No provision is made for a hearing by the voters and owners who do not sign the petition; and, hence, the board is not invested by the legislature with the power to pass upon their property rights, or to make any decision in relation thereto. (*Comrs. v. Griffin, supra*).

It is authorized to find the facts, that the territory is contiguous to the village, and that the petition is signed by the proper number of voters and owners. But its decision upon these preliminary questions of fact cannot be reviewed on *certiorari*. It is no part of the office of a writ of *certiorari* to an inferior tribunal to bring before the court, from which the writ issued, the evidence in the tribunal below, nor can the court receive testimony to show what that evidence was. Upon the return of the record, the court has no power to form and try an issue of fact in regard to the jurisdiction, nor to review the testimony heard below, nor to inquire into the correctness of the decision on that testimony. The trial is confined to the record, and extrinsic evidence is inadmissible. (*C. & R. I. R. R. Co. v. Whipple*, 22 Ill. 105; *Rue v. City of Chicago*, 66 id. 256).

We are inclined to think that there was no error in quashing the writ, because, in the first place, the action of the trustees in passing the ordinance of annexation was legislative in its character, and because, in the second place, the determination of the board as to the existence of the preliminary conditions required to precede the ordinance, involved a decision upon mere questions of fact.

The judgment of the Circuit Court is accordingly affirmed.

*Judgment affirmed.*

KATHARINE McDONALD

v.

ANNA CARR *et al.**Filed at Ottawa May 8, 1894.*

1. **RESULTING TRUST—when it arises.** As a general rule, where real property is purchased and paid for by one person and the legal title is taken in the name of another person, the parties being strangers to each other,—that is, not a wife or child, or person standing in that relation,—a resulting trust immediately arises from the transaction, and the person to whom the land is conveyed will hold it in trust for the one who paid the purchase money.

2. A purchased a tract of land in her own name, and paid the purchase money from her own funds. The contract for a deed provided that the vendor should convey to her, but when the last payment was made, at the request of A the deed was made to B. A and B had before that time married, but B then had a wife living from whom he had no divorce: *Held*, that A and B were strangers to each other, their marriage being void, and a resulting trust arose in favor of A, and that B took the legal title in trust for A.

APPEAL from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

This was a bill for partition, brought by Anna Carr, against Katharine McDonald and others, to divide a certain lot in Young and Clarkson's subdivision of a certain forty-acre tract of land in Cook county.

There is no substantial controversy in this case in regard to the facts. Michael Carr was married, in 1847, to one Hannah Rafferty, and the two resided together until about the year 1866, when Carr deserted his wife in the State of Wisconsin, and in 1868 Carr was married in Fall River, Mass., to Katharine McDonald. The parties moved to Chicago, and resided there, under the name of McDonald, until 1888, when Michael Carr died. Michael Carr had several children by his first wife, Anna Carr, the complainant, being one. Katharine

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Brief for the Appellant.

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McDonald had two children by Michael Carr, who are parties to this proceeding, by the names of Edward McDonald and Katie McDonald. On the 31st day of August, 1886, the appellant entered into an agreement, in writing and under seal, with James T. Young and Michael Clarkson, for the conveyance by them to her of lot 11, in block 1, in Young and Clarkson's subdivision, situate in what was then the town of Lake, in Cook county, for the price of \$450, of which sum \$300 was paid by her, in cash, upon the signing and delivery of the articles of agreement, and the balance, with interest, was, by the terms of the written contract, to be paid in one year from that date, and upon her performance of her covenants Young and Clarkson were to convey to her by deed. Before the expiration of one year the appellant paid the balance due under the contract, and at the time of making the payment she directed Young, one of the sellers, to make the deed to Michael Carr, under the name of Michael McDonald, instead of to herself, which was done.

The children of Michael Carr, by his wife, Hannah, claim title as heirs-at-law, and Anna Carr, one of said children, filed this her bill for partition, praying, also, that all questions of title be adjudicated, etc., and made appellant and her two children, and all the other children of Michael Carr, deceased, defendants. The appellant answered the bill and filed a cross-bill, claiming a resulting trust in her favor, based on the facts attending the purchase of the lot by her. The court, on the hearing, on the pleadings and evidence, entered a decree dismissing the cross-bill, and decreed in favor of the complainant in the original bill, as prayed therein. To reverse the decree Katharine McDonald appealed.

Mr. ROBERT B. KENDALL, for the appellant:

The payment of the purchase money by the appellant, unqualified by any other circumstance, immediately, by presumption, raised a trust in her favor, resulting from the fact

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Brief for the Appellant.

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of such purchase and payment, and the burden of rebutting such presumption devolved upon the heirs of the grantee. Pomeroy's Eq. Jur. sec. 155; Perry on Trusts, sec. 139; 3 Blackstone's Com. 330; *Harris v. McIntyre*, 118 Ill. 275; *Donlin v. Bradley*, 119 id. 412; *Reed v. Reed*, 135 id. 482; *Cook v. Patrick*, id. 499; *Champlin v. Champlin*, 136 id. 309; *Stevenson v. McClintock*, 141 id. 604.

The only exception to the presumption in favor of the person paying the purchase money arises where the real purchaser is under a legal, or, in some cases, a moral, obligation to maintain the person in whose name the title is taken, in which case the presumption is changed in favor of the grantee, and no trust results. Pomeroy's Eq. Jur. sec. 1039, and cases cited; Perry on Trusts, sec. 143, *et seq.*

The fact of payment of the purchase money, or of its ownership and payment in behalf of the owner, may always be shown by parol, notwithstanding the recital in the deed of payment by the grantee. *Boyd v. McLean*, 1 Johns. Ch. 582; *Perkins v. Nichols*, 11 Allen, 542; *Kelley v. Hill*, 59 Mo. 470; *Lloyd v. Carter*, 17 Pa. St. 216; *Byers v. Wackman*, 16 Ohio St. 440; *Kane v. O'Connors*, 78 Va. 76; *Guthrie v. Gardner*, 19 Wend. 414; *Runnels v. Jackson*, 1 How. (Miss.) 358.

Such evidence does not contradict the statement of the deed that the grantee paid the money, but shows the further fact that the money did not belong to him, but to the person claiming the trust. *Pritchard v. Brown*, 4 N. H. 397; Browne on Statute of Frauds, sec. 93.

Such facts may be proved by parol after the death of the grantee. Perry on Trusts, 138; Browne on Statute of Frauds, sec. 91; *Fansler v. Jones*, 7 Ind. 277; *Neill v. Keese*, 5 Texas, 23; *Champlin v. Champlin*, 136 Ill. 309.

Mr. GEORGE F. WESTOVER, for the appellees.



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Opinion of the Court.

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Mr. JUSTICE CRAIG delivered the opinion of the Court:

Katharine McDonald purchased the lot in question in her own name, and paid the purchase money from her own funds. The contract for a deed provided that the vendor should convey to Katharine McDonald, but when the last payment was made, at the request of Katharine McDonald the deed was made to Michael McDonald. As a general rule, where real property is purchased and paid for by one person and the legal title is taken in the name of another person, the parties being strangers to each other,—that is, not a wife or child, or person standing in that relation,—a resulting trust immediately arises from the transaction, and the person to whom the land is conveyed will hold it in trust for the one who paid the purchase money. (Perry on Trusts, sec. 126; *Donlin v. Bradley*, 119 Ill. 412; *Champlin v. Champlin*, 136 id. 312; *Harris v. McIntyre*, 118 id. 275.) The rule announced is well settled by the decisions of this court, and fully sustained by text writers and the decisions of other courts. Michael McDonald, at the time the deed was executed, was, in a legal sense, a stranger to Katharine McDonald. He was in no manner related to her, and no obligation rested upon her to support or provide for him. At the time of the pretended marriage in Fall River, Michael McDonald had a lawful wife residing in Wisconsin. He was never divorced from her, and the pretended marriage with Katharine was therefore void. Moreover, nothing occurred after the pretended marriage to render the cohabitation of the parties lawful. When, therefore, the deed was made, as Michael McDonald was a stranger to Katharine, no presumption could arise that the conveyance to him was intended as an advancement, but, on the other hand, as Katharine paid the purchase money and had the title placed in the name of a stranger, the presumption is that she intended the conveyance for her own benefit. Perry on Trusts, (sec. 143,) in speaking on this subject, says: "As before stated, if a purchaser of an estate pays the consideration

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Syllabus.

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money and takes the title in the name of a stranger, the presumption is that he intended some benefit for himself, and a resulting trust arises for him; but if the purchaser take the conveyance in the name of a wife or child, or other person for whom he is under some natural, moral or legal obligation to provide, the presumption of a resulting trust is rebutted, and the contrary presumption arises."

No evidence whatever was introduced tending to prove any previous agreement between Katharine and Michael McDonald that the deed should be made to him, nor was there any evidence introduced tending to prove why the deed was made to him. Thus, from the evidence, as it appears in the record, the presumption is that she intended the conveyance for her own benefit. As she paid the purchase money and took the title in the name of a stranger, a resulting trust arose. "As the property was never owned by Michael Carr, but was held by him in trust for Katharine McDonald, his children did not acquire title, by descent, upon his death, and complainant was not entitled to a decree.

The decree will be reversed and the cause remanded, with directions to the circuit court to enter a decree in favor of Katharine McDonald on her cross-bill.

*Decree reversed.*

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GEORGE F. SAVITZ

v.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

*Filed at Mt. Vernon May 5, 1894.*

**RAILROADS—unjust discrimination—a question of fact.** Where a railway company charges a plaintiff a greater rate for freight than it does another party for the same distance of transportation of similar freight, the question whether this is an unjust discrimination is one of fact. The fact whether the freight of the plaintiff is of the same class as that of the other person is material in determining whether the discrimination is unjust. The difference in the charge, at most, only makes out a *prima facie* case of unjust discrimination.

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Briefs of Counsel.

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WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of St. Clair county; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. JOHN G. IRWIN, and Mr. CHARLES E. WISE, for the plaintiff in error:

As to what constitutes unjust discrimination, see *Vincent v. Railroad Co.* 49 Ill. 35; *People v. Railroad Co.* 55 id. 111; *Railway Co. v. People*, 56 id. 365; *Railroad Co. v. People*, 67 id. 19; *Railroad Co. v. People*, 121 id. 310; Hutchinson on Carriers, sec. 302; *Scofield v. Railway Co.* 43 Ohio St. 571; *State v. Railway Co.* 47 id. 130; *Messenger v. Railroad Co.* 36 N. J. 407.

Messrs. POLLARD & WERNER, for the defendant in error:

This suit is based upon a penal statute, and all the rules applicable to the enforcement of penal statutes require that it shall be made clearly to appear that the precise statutory offense has been committed. *Railroad Co. v. People*, 77 Ill. 443; *Coal Co. v. Railroad Co.* 17 Bradw. 619.

The issue to be tried is, was there an unjust discrimination. It must appear, not only that the defendant has made a discrimination in its rates or charges of freight, but that such discrimination was unjust; and the company can successfully defend by traversing the allegation that there was an unjust discrimination. *Railroad Co. v. People*, 67 Ill. 21; *Railroad Co. v. Hill*, 11 Bradw. 252; 14 id. 587.

But it is not enough to show there was a discrimination,—the plaintiff must go further, and prove that the discrimination was an unjust one. *Railroad Co. v. Hill*, 11 Bradw. 252.

A difference in the manner of transportation, and in the service rendered by the railroad company, justifies a difference in rates. *Coal Co. v. Railroad Co.* 17 Bradw. 614; *Railroad Co. v. People*, 121 Ill. 304.

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Opinion of the Court.

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Mr. JUSTICE WILKIN<sup>1</sup> delivered the opinion of the Court :

This is an action of assumpsit, brought by appellant, against appellee, in the circuit court of St. Clair county, to recover damages for an alleged unjust discrimination in the transportation of coal. The trial was before the court, without a jury, on the first count of the declaration and a plea of the general issue, and resulted in a judgment for the defendant. The Appellate Court having affirmed that judgment, appellant prosecutes this appeal.

No propositions of law were submitted to the trial court by the plaintiff, and no errors are assigned by him upon the rulings of that court in the exclusion or admission of testimony. The defendant submitted five propositions, three of which were held and the others refused,

The action is brought under the statute of this State against extortion and unjust discrimination by railroads in the transportation of passengers and freight. (2 Starr & Curtis, par. 150, chap. 114, page 1964.) The discrimination alleged in the declaration is, that the defendant charged the plaintiff forty-five cents per ton for transporting coal from his mine to East St. Louis, and at the same time charged the Consolidated Coal Company but thirty-one and a quarter cents per ton for shipments to the same place from one of its mines, which, like that of the plaintiff, was situated on the line of the defendant's road, between ten and fifteen miles east of said city. There was no controversy upon the trial as to the fact that the plaintiff had, during the time alleged, shipped large quantities of coal from his mine to East St. Louis, for which he was charged by the defendant, and paid, forty-five cents per ton, and that during the same time the Consolidated Coal Company also shipped from a mine similarly situated, as to legal freight charges, to the same place, coal, for which it was charged, and paid, but thirty-one and a quarter cents per ton, and counsel for appellant seem to understand this

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Opinion of the Court.

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fact is conclusive of defendant's liability. There was, however, no conflict in the evidence as to the further fact that the coal of plaintiff so shipped was known as "commercial coal," while that transported for the coal company was called "railroad coal," and that the manner of loading and delivering the two classes was materially different, and whether there was an unjust discrimination against plaintiff in the different charges of freight was a question of fact, to be determined from all the evidence. Proof of the allegations of the declaration, at most, only made a *prima facie* case against the defendant. (Par. 147, chap. 114, *supra*.) Certainly it can not be said there is no evidence in this record tending to justify the discrimination in charges made. The coal was not of the same class nor was it shipped in the same manner. By the express language of the statute the right of action accrues only when the discrimination is *unjust*, (par. 150, *supra*,) and that fact having been found against the plaintiff, the judgment below must be affirmed, unless it has been made to appear that prejudicial error was committed by the trial court in its ruling upon propositions of law. No complaint of that kind is made. The argument in this court on behalf of appellant, as well as that filed in the Appellate Court and re-filed here, seems to be directed against the conclusion of fact reached by the courts below, and not to the manner in which the law was applied to those facts.

The record, in our opinion, is free from error, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE PHILLIPS, having heard this case in the Appellate Court, took no part in its decision here.

## Syllabus.

JACOB KOCH *et al.*

v.

AMBROSE ROTH.

*Filed at Mt. Vernon May 5, 1894.*

1. CONTRACT OF SALE—*purchaser to pay indebtedness of vendor—discounting claims—right of vendor to the benefit thereof.* A, failing to succeed in the brewery business, entered into an agreement with B, C and D, by which a company was to be formed, and the property of A was to be turned over to the company so formed and his debts discharged. Stock was to be issued to the amount of \$9000, of which \$2000 was to be given to A, and he was to be employed by the company. The value of the property turned over by him was \$14,000, or \$9000 over and above a mortgage on the property. The stock received by A represented to him \$2000 of its value. The others did not pay full value for their stock. They received \$7000 in stock, representing \$7000 in value of the property. For this they paid \$7000 of A's debts with only \$4415.27, under a settlement with A's creditors: *Held*, that they could not retain the discount, but must account to A for the same.

2. The purchase money agreed to be paid was \$14,000, and after applying the stock issued to A, his remaining indebtedness was \$12,000, being \$5000 due on the mortgage and \$7000 of other debts of A. B and the corporation paid this sum, on settlement with the creditors of A, with \$4415.27: *Held*, that B and the corporation were liable to A for the amount of this discount at which they settled the indebtedness agreed to be paid,—in other words, they were liable to A for the difference between \$7000 and \$4415.27, to-wit, \$2584.73.

3. SAME—*construed—payment of debts of vendor.* A, the owner of lots having a brewery thereon, sold the real estate to B for \$13,000, and personal property connected with the brewery for \$1000, the price to be paid as follows: \$2000 in shares of stock in a brewery company as soon as organized, and the remainder to be by B applied on the debts of A, including a mortgage of \$5000 on the lots sold. The company was formed and the lots conveyed to the company. A received his stock and applied \$1000 thereof in payment of the personal property and a like sum toward payment of the \$13,000, leaving a remainder of \$12,000. A's debts amounted to \$12,000. There were ninety shares of stock issued in all, of the value of \$9000: *Held*, that the stock issued to A was subject to its proportion of the burden of the incumbrance.

4. VENDOR'S LIEN—*notice to second purchaser.* If the purchaser of land knows that his vendor is still owing a part of the purchase money,

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Syllabus.

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for which no security has been given, he will take the land subject to the implied lien of the original vendor.

5. *SAME—promise to pay creditors of vendor.* Where the grantee of land agrees with the grantor to pay a definite part of the purchase money upon debts of the latter, the lien of the vendor will not be waived. On principle there is no good reason why there shall not be alien for unpaid purchase money due the vendor, whether such money is to be paid into the hands of the vendor himself, or into the hands of a creditor for his benefit. Equity looks to substance, and not form.

6. *SAME—in case of exchange of lands—promise to discharge liens.* It has been held, that where there is an exchange of lands, a covenant by one of the parties to pay off the liens on the lands transferred by him, as part of the consideration of the land deeded to him, is as much an agreement to pay a part of the purchase money as though there had been an agreement to pay that amount directly to the vendor to enable him to pay off the liens.

7. *SAME—limited to unpaid purchase price.* The grantor's lien is only permitted as a security for the unpaid purchase price of land sold, and not for any other indebtedness or liability. There must be a certain, ascertained, absolute debt owing for the purchase price. The lien does not exist on behalf of any uncertain, contingent or unliquidated demand.

8. *SAME—waiver of the lien.* Where the obligation of the vendee to discharge a definite amount of indebtedness owing by the vendor appears to be substituted for the purchase money, or to be taken instead of the purchase money, or as a direct security for it, the lien is lost.

9. Where land and personal property are sold together, under one contract, at a gross price, without stating the separate price of the land and personalty, so that it can not be determined what part of the gross price is for the one and what part is for the other, there will be a waiver of the vendor's lien, as it will be presumed that the vendor intended to rely upon the personal responsibility of the vendee.

10. *CONSIDERATION—recital in a deed—subject to explanation.* The formal clause in a deed reciting the consideration, is always open to explanation; and such a recital does not waive or destroy the vendor's lien, but is only *prima facie* evidence of payment. The fact of the non-payment of all of the purchase money may be shown, and when such fact appears, a lien may be declared, notwithstanding the formal receipt for the purchase money.

11. It is well settled that the recital of the consideration in a deed or bill of sale is not conclusive on either party, and that it may be shown by parol what the true amount of the consideration is, and how it is to be paid.

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Brief for the Appellants.

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12. CORPORATION—*notice to officer or agent.* Notice to the head officer or managing agent of a corporation may usually be regarded as notice to the corporation itself.

13. PAYMENT—*election as to application.* The debtor is entitled to elect on which of two debts a payment shall be credited, and it is the duty of the creditor to so apply it. But this election must be made at the time of the payment. Where the debtor pays generally, or fails to make the application when he might do so, the creditor may apply the payment to whatever debt he pleases, unless there are circumstances which would render the exercise of such discretion by him unreasonable, and unjust to the debtor. If no application is made by either party, the court will make it according to the equity and justice of the case.

14. PRACTICE—*amending bill on the hearing.* It is within the discretion of the court to allow a complainant to amend his bill on the hearing, where the amendment works no injustice or hardship to the defendant. Where the record shows that the defendant is also granted leave to amend his answer, and it does not appear that any exception was taken to the ruling of the court overruling the objection to the complainant's amending his bill, or that any suggestion was made of surprise or of the necessity of a continuance, and there is nothing in the record to show that the defendant was injured by the action of the court, it can not be said that there was any abuse of discretion, or error, in permitting the amended bill to be filed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. A. S. WILDERMAN, Judge, presiding.

Mr. CHARLES P. KNIGHT, for the appellants:

The recital of a consideration in a certain sum does not fix an absolute obligation on the part of the grantee to pay that sum. It may be controlled by a contemporaneous agreement fixing a mode of payment, and providing for a payment of a different amount. *Fort v. Richey*, 128 Ill. 502; *Booth v. Hynes*, 54 id. 363; *Drury v. Holden*, 121 id. 180; *Primm v. Legg*, 67 id. 500.

Appellee's bill is framed upon that theory. Courts have no right to make a contract, either by rejecting some of its provisions or by adding new ones, or by placing upon its pro-



## Brief for the Appellants.

visions an arbitrary construction. *Welsch v. Savings Bank*, 94 Ill. 191.

There was neither an express trust nor a constructive trust. No fiduciary relation existed between the parties. Appellants were neither trustees, agents, partners, attorneys, tenants in common, etc., of or for appellee. They were purchasers, simply. The parties dealt at arm's length with each other, as in any other case of vendor and vendee. That this is the true view of the case is borne out by the decisions of this court in *Steele v. Clark*, 77 Ill. 471, and *Doyle v. Murphy*, 22 id. 502. See, also, *Clark v. Wright*, 24 S. C. 526; *Bennett v. Whitney*, 49 Mo. 58.

The burden of proof is on the party seeking to establish a trust, and the evidence must be clear, full and satisfactory. 10 Am. and Eng. Ency. of Law, 29, 84; *Green v. Dietrich*, 114 Ill. 636; *Lehman v. Lewis*, 62 Ala. 129; *Whitmore v. Larned*, 70 Me. 276.

The vendor can not claim a lien as security for an uncertain demand. If the consideration is not to be money, then no lien is created. If the obligation be for the discharge of a liability to a third party, no lien is created, and where the obligation of the vendee be the payment of the grantor's debts, the lien is lost. Devlin on Deeds, sec. 1256; *Payne v. Avery*, 21 Mich. 524; *Patterson v. Edwards*, 29 Miss. 67; *Vandoren v. Todd*, 2 Green's Ch. 397; *Chapman v. Beardsley*, 31 Conn. 115; *Hiscock v. Norton*, 42 Mich. 320; *Sears v. Smith*, 2 id. 243; *Arlin v. Brown*, 44 N. H. 102; *Chase v. Peck*, 21 N. Y. 581; *McKillip v. McKillip*, 8 Barb. 552; *Brawley v. Catron*, 8 Leigh, 522; *McKandlish v. Keen*, 13 Gratt. 615; *Dixon v. Gayfeve*, 17 Bradw. 421; *Buckland v. Packnell*, 13 Sim. 406; *Burns v. Taylor*, 23 Ala. 255; *Farrott v. Sweetland*, 3 M. & K. 655; *Winter v. Lord Anson*, 1 Sim. & Sta. 435; *Clark v. Royle*, 3 Sim. Ch. 500; *Jenkins v. Doolittle*, 69 Ill. 415, and 55 id. 400.

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Brief for the Appellee. Opinion of the Court.

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Messrs. HAY & WINKELMAN, for the appellee:

The question whether the decree was for too large a sum was not made in the Appellate Court, and can not be raised in this court. *Redlich v. Bauerlee*, 98 Ill. 137; *Thayer v. Peck*, 93 id. 357; *Bank v. LeMoine*, 127 id. 254.

In *Hitchcock v. Watson*, 18 Ill. 289, the court say: "An agent or trustee for another can not speculate in the execution of his fiduciary duties or employment, and if he, by compromise or otherwise, liquidates or pays off a debt of his principal or *cestui que trust* at less than he has received for that purpose, he is accountable for the residue." Story on Agency, sec. 211; *Switzer v. Skiles*, 3 Gilm. 529.

In *Casey v. Casey*, 14 Ill. 127, the court say: "Where confidence is reasonably reposed, that confidence must not be abused. The party relied upon must see that he meets fully and fairly the responsibility of his position, and does not take advantage of it to the injury of the other, and his own advantage."

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is a bill filed, as originally drawn, on April 1, 1892, and as finally amended, on December 14, 1892, by the appellee, Ambrose Roth, against the appellants, Jacob Koch, Isadore Probst and The New Athens Brewing Company, to enforce a vendor's lien, alleged to have been created by the sale by Roth to Koch on September 23, 1891, of certain lots in the village of New Athens in St. Clair County owned by Roth, and for which he, on that day, executed a warrantee deed to Koch for an expressed consideration of \$13,000.00. The answer denies, that the complainant is entitled to the relief asked for, and prays the same advantage of the answer as if the bill had been demurred to. By decree rendered on December 14, 1892, the Circuit Court found, that there was due the complainant for unpaid purchase money the sum of \$2584.73 with inter-

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Opinion of the Court.

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est at five per cent from September 23, 1891, amounting to \$2712.78, and that he had a vendor's lien upon the lots for that amount, and decreed that in default of payment within a certain time, the lots should be sold by the master. Upon appeal to the Appellate Court said decree was affirmed, and the present appeal is prosecuted from such judgment of affirmance.

*First*, it is claimed that the trial court erred in permitting the complainant to file an amended bill at the hearing.

The statute provides, that the court may permit the parties to amend their pleadings so that neither party is surprised or unreasonably delayed, and that such amendment shall not be a ground for continuance without an affidavit that the party affected thereby is unprepared to proceed to trial, etc. (Chancery Practice Act, sec. 37; 1 Starr & Cur. Ann. Stat. page 409.) In *Mason v. Bair*, 33 Ill. 194, an amendment to the bill was allowed after the cause had been submitted on the evidence, and it was held that its allowance was within the discretion of the court, which would not be controlled unless the amendment worked injustice or great hardship to the defendant. In *Booth v. Wiley*, 102 Ill. 84, an amendment to the bill was allowed after the introduction of all the evidence and the argument of the cause; and it was held not to be error, it not appearing that the defendant was prejudiced thereby in any substantial manner. In the present case, the decree recites, that the leave to amend the bill was granted against the objection of the defendants, but they were given leave to file an amended answer; and it nowhere appears, that any exception was taken to the ruling of the court overruling the objection, or that any suggestion was made of surprise, or of the necessity of a continuance. There is nothing in the record to show, that the defendants were in any way injured or prejudiced by the action of the court, and it cannot, therefore, be said that there was any abuse of discretion, or error, in permitting the amended bill to be filed.

## Opinion of the Court.

*Second*, it is claimed by appellants that the consideration for the purchase of the property was all paid, and that there was no unpaid purchase money for which a vendor's lien could exist as security.

There was a brewery upon the lots sold, and on the same day on which the conveyance of the lots was executed, a bill of sale of the personal property connected with the brewery, consisting of horses, a wagon, beer-tanks, kegs, tools, etc., was executed and delivered by appellee to Koch for a consideration, expressed therein, of \$1000.00, making the total consideration for the brewery, including both realty and personalty, the sum of \$14,000.00 upon the face of the papers. It is well settled, however, that the recital of the consideration in a deed or bill of sale is not conclusive upon either party; and that it may be shown by parol what the true amount of the consideration is, and how it is to be paid. (*Booth v. Hynes*, 54 Ill. 363; *Primm v. Legg*, 67 id. 500; *Drury v. Holden*, 121 id. 130; *Fort v. Richey*, 128 id. 502). The formal clause in a deed reciting the consideration is always open to explanation; and such a recital does not waive or destroy the vendor's lien, but is only *prima facie* evidence of payment. The fact of the non-payment of all the purchase money may be shown, and, when such fact appears, a lien may be declared, notwithstanding the formal receipt for the consideration. (2 Warvelle on Vendors, page 705).

It is shown here, that the appellee received no money upon the delivery of the deed and bill of sale. The amended bill alleges, that Roth sold the land to Koch for \$13,000.00, and the personal property for \$1000.00, and "that it was agreed \* \* \* that said sum of \$13,000.00 and said \$1000.00 be paid as follows: \$2000.00 in shares of the Brewing Company to said complainant as soon as said Brewing company was organized, and the remainder (to) be by said Koch applied on the debts then existing against this complainant including a mortgage, then a lien on said lots;" that, on September 24,

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Opinion of the Court.

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1891, complainant delivered to Koch the possession of the realty and personalty; that, on September 26, 1891, Koch conveyed the lots to the New Athens Brewing Company; that, on September 30, 1891, complainant received the shares of stock amounting to \$2000.00, and has applied \$1000.00 thereof in payment of the personalty, and \$1000.00 toward the payment of \$13,000.00, the purchase price for the realty, leaving a remainder of \$12,000.00 with interest; that, by the agreement, complainant's debts were to be paid forthwith by Koch; that such debts amounted to \$12,000.00, and Koch had notice of the amount and who the creditors were, but neglected and refused to pay the creditors the several amounts due them; and that the Brewing Company had notice, before the conveyance to it, of the non-payment of the purchase money due from Koch.

The proof shows, that Probst was the president of the Brewing Company, Koch its manager, and Henry Dose, its secretary. These parties organized the corporation, and had full notice of the facts in regard to the consideration for the purchase of the property, and how much indebtedness was assumed, and how much, if any, had been paid when the property was transferred to the company; and it is not contended, that the corporation itself was not affected with such notice. If the purchaser of land knows, that his vendor is still owing a part of the purchase money, for which no security has been given, he will take the land subject to the implied lien of the original vendor. (*Harshbarger v. Foreman*, 81 Ill. 364; *Moshier, Admr. v. Meek*, 80 id. 79; 2 Warvelle on Vendors, pages 699, 700). Notice to the head officer or managing agent of a corporation may usually be regarded as notice to the corporation itself. (2 Morawetz on Priv. Corp. sec. 540 b.).

The proof also shows, that, when the deed and bill of sale were delivered, the debts amounted to about \$12,000.00 without interest, including a mortgage of \$5000.00 upon the lots. We understand from the evidence, that the mortgage still

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Opinion of the Court.

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rests upon the lots, and that its payment, whether originally assumed by Koch himself, or not, has been assumed by, and is a liability of, the Brewing company. This being so, of the \$9000.00 of stock issued, (90 shares each at the face value of \$100.00), the 20 shares of the face value of \$2000.00 given to appellee, would be subject to their proportion of the burden of the incumbrance.

As to the indebtedness not represented by the mortgage, most of which had been reduced to judgment and was in the shape of liens upon the property, the testimony shows conclusively, that this has been discharged in full by Koch and Probst. But the amount paid to discharge it was only \$4415.27. The creditors were settled with at less than the face of their claims. The theory of the appellee, and that, upon which the decree below was based, is, that the purchase money agreed to be paid for the property was \$14,000.00, as named in the deed and bill of sale; that, after applying the \$2000.00 of stock in the manner already stated, the remaining indebtedness was just \$12,000.00, towit: \$5000.00 due on the mortgage, and \$7000.00 of other indebtedness; that the appellants paid \$4415.27 and assumed \$5000.00, making \$9415.27; that the appellee was entitled to recover the difference between \$12,000.00 and \$9415.27, towit: \$2584.73.

The testimony on behalf of the complainant tends to sustain his position, that a particular sum was agreed upon as the amount of indebtedness to be paid, over and above the amount of the mortgage. The testimony on behalf of appellants tends to show, that the agreement was to pay off and discharge the indebtedness whatever it was, whether more or less than a certain amount. As the Circuit Court has found in favor of the complainant upon this subject, and the Appellate Court has affirmed the finding, we are not disposed to disturb the conclusion reached by them upon the question of fact, particularly in view of the following considerations: *First*, the sums mentioned in the deed and bill of sale could

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Opinion of the Court.

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not have been agreed upon, on any other theory than that the total consideration was \$2000.00 in stock, the assumption of the mortgage for \$5000.00, and the payment of other indebtedness for \$7000.00; *Second*, there is evidence to the effect that, when the deed was made to Koch, he had before him a statement of the debts and figured upon them; and the sum total of the various amounts due the different creditors, as such amounts are given in the record, is just about \$7000.00; *Third*, when the corporation was formed, the stock was \$9000.00, and, after taking out the \$2000.00 turned over to appellee, there was \$7000.00 left, which represented what Koch and Probst received for what they paid, over and above the mortgage.

The question then arises, whether appellants are liable to the appellee for the amount of the discount at which they settled the indebtedness agreed to be paid, or, in other words, whether they are liable to account to appellee for the difference between \$7000.00 and \$4415.27, to wit: \$2584.73.

The theory, upon which appellee claims that the amount of this discount is due to him as unpaid purchase money, is that Koch was his agent or trustee to apply the property transferred to him to the payment of appellee's creditors, and, therefore, could not speculate with reference to the liens and debts for his own benefit, nor make a profit which he was not bound to account for to appellee. Let us see what the facts are. Roth had failed to make a success of his brewery, and was in financial straits. He applied to Dose to borrow money for him, but did not obtain it, and then to get a partner for him, but none was found. It was then proposed to organize a stock company, "so that he would be relieved of his trouble." Dose saw Koch and Probst, and the three made the arrangement, by which a company was to be formed, the property of Roth was to be turned over to the company so formed, his debts were to be discharged, stock was to be issued to the amount of \$9000.00, of which \$2000.00 was to be given to

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Opinion of the Court.

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Roth, and he was to be furnished with employment by the company. The scheme seems to have been entered into by these parties primarily for the relief of Roth, and as a joint enterprise in which they were to be shareholders with him. The estimated value of the property turned over by him was \$14,000, or \$9000.00 over and above the mortgage. The stock received by appellee represented to him \$2000.00 of this value, that is to say, he parted with property worth \$2000.00 in exchange for his stock. But appellants did not pay full value for their stock. They received \$7000.00 of stock, represented by \$7000.00 in value of appellee's property, and yet paid only \$4415.27 for it. Under the circumstances, we think that the relations, which appellants bore to appellee, were of such a nature as to forbid them to make this discount at his expense. They acted for him, and as his agents, in the matter of carrying out the arrangement for his relief.

In *Phelps v. Reeder*, 39 Ill. 172, where one of two tenants in common of land purchased his co-tenant's interest therein, and there were mechanics' liens upon the premises, which were to be paid off by the purchasing tenant by allowing a sale to take place under the anticipated decree and having him become the purchaser, and he was to be allowed, as a credit on the purchase money, one half of the full amount of those debts; it was held, that this agreement constituted the purchaser the agent of his vendor in respect to the payment of these liens; that, as such agent, he could not speculate in regard to the discharge of the liens at the expense of his principal; that, whatever abatement of the liens the agent may have procured, he would be required to allow it to his principal.

In *Hitchcock v. Watson*, 18 Ill. 289, we held that an agent or trustee for another cannot speculate in the execution of his fiduciary duties or employment; and if he, by compromise or otherwise, liquidates or pays off a debt of his principal, or *cestui que trust*, at less than he has received for that purpose, he is accountable for the residue.



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Opinion of the Court.

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We are, therefore, of the opinion, that the sum, decreed to be due to appellee, was so due to him.

*Third*, did a vendor's lien exist in favor of appellee for the difference between the amount of indebtedness agreed to be paid and the amount actually paid?

Counsel for appellants refer to a statement in Devlin on Deeds, (vol. 2, sec. 1256), in support of the proposition, that, if the obligation of the vendee of land be for the discharge of a liability to a third party, no lien is retained by the vendor when the conveyance is absolute; and that, in order to create a vendor's lien there must not only be a debt for unpaid purchase money to a fixed amount, but that such debt must be due directly to the vendor. The cases relied on in support of the proposition are *Patterson v. Edwards*, 29 Miss. 67; *Chapman v. Beardsley*, 31 Conn. 115; *Hiscock v. Norton*, 42 Mich. 320; *Sears v. Smith*, 2 id. 243; *Van Doren v. Todd*, 2 Green Ch. 397. In the Mississippi case the deed recited a consideration of \$10,000.00 paid in cash, and "in consideration of said Edwards (the vendee) assuming to well and truly pay and satisfy the principal and interest, due upon" two certain notes due to the Planter's Bank, and payable February 26, 1840. The deed upon its face left the precise amount of the consideration unstated, and to be determined by reference to an outside matter. In the Connecticut case, also, the amount of the consideration was indefinite, it appearing that the vendee, to whom the conveyance was made, assumed the payment of "other claims together with the mortgage debt to the bank." In neither of the other cases referred to did the facts show an assumption of the debts of the vendor by the vendee. In *Sears v. Smith*, *supra*, the lien was held to have been waived, because the vendor accepted the note of a third person, either as security, or in absolute payment for the land. In *Van Doren v. Todd*, *supra*, it was held, that the lien was not waived, although the period of payment was dependent upon the life of another person, etc. In *Hiscock v. Norton*,

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Opinion of the Court.

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*supra*, the vendee agreed to build a house for the vendor, and other elements of an indefinite character entered into the consideration; and there was held to be no lien, because the sale was not for a specific sum, and it could not be ascertained with any certainty what the amount in money was, for which the lien was sought to be enforced. Other cases are referred to by counsel, where the vendee agreed to support the vendor during his life, and where the consideration was for personal services of an indefinite character, such as *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh, 522; *McCandlish v. Keen*, 13 Gratt. 615; *McKillip v. McKillip*, 8 Barb. 552. The rule, extracted from all these cases by Pomeroy in his work on Equity Jurisprudence, is thus stated by him, (vol. 3, sec. 1251): "The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase price, and not for any other indebtedness or liability. There must be a certain, ascertained, absolute debt owing for the purchase price; the lien does not exist in behalf of any uncertain, contingent or unliquidated demand."

In the case at bar, the amount of indebtedness to be paid by the vendee was fixed at a specified sum, which went to make up the amount of the consideration named in the deed. Hence, there was no violation of the rule, laid down by the author above referred to, in the following words: "The vendor cannot claim a lien as security for an uncertain demand." (2 Devlin on Deeds, sec. 1256.) Of course, where the obligation of the vendee to discharge a definite amount of indebtedness owing by the vendor appears to be substituted for the purchase money, or to be taken instead of the purchase money, or as a direct security for it, the lien is lost. But we see nothing in the facts of the present case to indicate, that such was designed to be the object of the agreement to pay the vendor's debts. Upon principle, there can be no good reason why there should not be a lien for unpaid purchase money due the vendor, whether such money is to be paid into the

## Opinion of the Court.

hands of the vendor himself, or into the hands of a creditor for his benefit. The obligation to pay the debts in such case is that of the vendee himself, and not the obligation of a third person, and, therefore, cannot be regarded as the taking of such outside security as will waive the lien. (2 Warvelle on Vendors, page 714; *Boynton v. Champlin*, 42 Ill. 57; *Sears v. Smith*, *supra*; *Lehndorf v. Cope*, 122 Ill. 317.) "Generally speaking, the lien of the vendor exists; and the burden of proof is on the purchaser to establish that, in the particular case, it has been intentionally displaced, or waived by the consent of the parties." (2 Story's Eq. Jur. sec. 1224.) The vendor's lien is based upon the theory, that a vendee ought not to hold the land of another and not pay for it; and the rule, that equity looks to substance and not form, is applicable in the enforcement of vendor's liens. (*Beal v. Harrington*, 116 Ill. 113; 2 Warvelle on Vendors, 707.)

It has been held, that, where there is an exchange of lands, a covenant by one of the parties to pay off the liens on the land transferred by him, as part of the consideration of the land deeded to him, is as much an agreement to pay a part of the purchase money, as though there had been an agreement to pay that amount directly to the vendor to enable him to pay off the liens. If the agreement is not kept, so much of the consideration fails, and a vendor's lien exists for the amount paid to clear off the liens. (*Elliott v. Plattor*, 43 Ohio St. 198; *Pratt v. Eaton*, 65 Mo. 157; *Bennett v. Shipley*, 82 id. 448; *D., X & B. R. R. Co. v. Lewton*, 20 Ohio St. 401; 2 Warvelle on Vendors, 707.) In *Mackreth v. Symmons*, 15 Ves. 329, Lord Eldon decided in favor of the lien as to the debt assumed by the purchaser but which he failed to pay, while he refused to extend it to the annuities. (2 Sugden on Vendors, page 679, sec. 19.) The question, whether the vendor is entitled to a lien, where the vendee fails to pay debts due by the vendor which he has agreed to assume as part of the

## Opinion of the Court.

purchase money, was only incidentally referred to in *Manning v. Frazier*, 96 Ill. 279; and was not directly involved in *Doolittle v. Jenkins*, 55 Ill. 400.

Counsel for appellant makes the point, that personalty as well as realty entered into the consideration for the sale, and that there can be no vendor's lien for a sale of personalty. Where land and personal property are sold together, under one contract, at a gross price, without stating the separate price or value of the land and personalty, so that it cannot be determined what part of the gross price is for the one and what part is for the other, there will be a waiver of the vendor's lien, as it will be presumed that the vendor intended to rely upon the personal responsibility of the vendee. (*Stringellows v. Ivie*, 73 Ala. 209; *Wilkinson v. Palmer*, 82 id. 367; *McCandlish v. Keen*, *supra*; *Young v. Harris*, 36 Ark. 162). But no such state of things exists in this case. A price or value was fixed upon the personalty separate from that fixed upon the realty, the price of the one being \$1000.00 as stated in the bill of sale, and of the other being \$13,000.00 as stated in the deed. As to the payment of the \$2000.00 in stock, the vendor had the right to apply one half of it in payment for the personalty, in the absence of any direction by the vendee to make a different application. The debtor is entitled to elect on which debt the payment shall be credited, and it is the duty of the creditor to so apply it. This election, however, should be made at the time the payment is made. Where the debtor pays generally, or fails to make the application when he might do so, the creditor may apply the payment to whatever debt he pleases, unless there are circumstances which would render the exercise of such discretion by him unreasonable, and unjust to the debtor. If no application is made by either party, the court will make it according to the justice and equity of the case. (*McCurdy v. Middleton*, 82 Ala. 131; *Arnold v. Johnson*, 1 Scam. 196; *Alexandria v. Pat-ten*, 4 Cranch, 316; *U. S. v. Kirkpatrick*, 9 Wheat. 720.) We

## Syllabus. Opinion of the Court.

see nothing in the circumstances of this case to indicate, that the application as made was not reasonable and just.

We think that the decree of the Circuit Court was correct in awarding a lien in favor of appellee. The decree of that court, and the judgment of the Appellate Court, are affirmed.

*Judgment affirmed.*

HEINZELMAN BROS. *et al.*

v.

HENRY E. SCHRADER, Assignee.

*Filed at Mt. Vernon May 5, 1894.*

150	227
150	462
150	227
158	108
150	227
57a	149
150	227
59a	424
150	227
170	623

A 384

**INSOLVENT DEBTOR—assignment—appeal from order of distribution.** No appeal lies to the circuit court, from an order of the county court, refusing to order payment, by the assignee of an insolvent bank, of a dividend on certain certificates of indebtedness against the insolvent bank.

**APPEAL** from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. GEORGE W. WALL, Judge, presiding.

Messrs. HAMILL & BORDERS, for the appellants.

Mr. MARSHALL W. WEIR, for the appellee.

**Per CURIAM:** Appellee is assignee of the People's Bank of Belleville, appointed under a voluntary assignment, made in pursuance of our statute in force July 1, 1877. On the 26th of June, 1891, appellants entered their motion in the county court of St. Clair county, where the assignment proceedings were pending, for an order directing the assignee to pay a dividend of twenty per cent on certain certificates of indebtedness against the bank, claimed to be owned and held by them. The motion was denied, and appellants prosecuted

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Opinion of the Court.

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an appeal to the circuit court of that county. The case was tried in that court *de novo*, and an order entered directing the assignee to pay, not only the twenty per cent dividend asked for in the county court, but also to pay dividends on the certificates in the future, the same as on other claims allowed against the assigned estate, and that the assignee pay the costs. The Appellate Court reversed that order and remanded the case, with directions to dismiss the proceedings.

It is difficult, if not impossible, to reach a different conclusion from that arrived at by the Appellate Court upon the merits of the controversy, if the facts are accepted as recited in its final judgment. But we do not think the order of the circuit court can be sustained in any view of the case. Clearly, that court had no jurisdiction of the subject matter of the litigation. The administration of the assigned estate could not, in the manner attempted, be transferred from the county to the circuit court. The learned judge who heard the case in the circuit court evidently so understood it, for he said, in rendering his decision, (copied by counsel for appellants in their argument): "I find it very difficult for me to indicate in advance just what sort of a judgment ought to be entered, unless a mere judgment of advice." But independent of that view, it has been expressly decided by this court that an appeal in such cases does not lie to the circuit court. *Union Trust Co. v. Trumbull et al.* 137 Ill. 146.

The judgment of the Appellate Court reversing the order of the circuit court will be affirmed, and the case will be remanded to the circuit court, with directions to dismiss the appeal from the county court.

*Judgment affirmed.*

MR. JUSTICE PHILLIPS took no part.

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Syllabus.

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58a 450

## THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS

v.

## THE NEWBERRY LIBRARY.

*Filed at Ottawa May 8, 1894.*

1. **NEWBERRY WILL**—*powers of the trustees—limitations of the will.* The trustees under the Newberry will had two things to do, viz., to manage and to distribute the estate. When the appointed time for distribution came, and the estate was distributed, their functions as trustees of the will ceased, and the distributees took an absolute ownership, free of any control of the trustees. So, too, the share to be applied for the founding of a free public library, when so applied, was to belong absolutely to such library, freed from all control of the trustees appointed by the will.

2. The limitation of the powers by the Newberry will as to the time the trustees might lease property and as to investments and the securities taken on loans, has nothing to do with any portion of the estate devised after its distribution by the trustees.

3. **PUBLIC LIBRARY**—*statute construed—effect on trustees under the Newberry will.* Section 4 of an act entitled "An act to encourage and promote the establishment of free public libraries in cities, villages and towns," approved June 17, 1891, does not add to the duties of the trustees of the Newberry will. It does make the clause of the will providing for the founding of a free public library a part of the law of the being of the Newberry Library, and such corporation can not, under section 4 of such act, transform the library into a book repository, not free, or remove it from the North Division of Chicago. But such corporation is not bound, in the management of its income, to pay heed to the restrictions put upon the trustees from whom it received the fund.

4. **CHANCERY JURISDICTION**—*to construe an instrument creating a trust.* It is one of the well recognized functions of courts of equity, whenever there is any *bona fide* doubt as to the true meaning of an instrument creating a trust, to, at the suit of the trustee brought for that purpose, give a judicial construction to the instrument, and direction to the trustee as to his powers and duties thereunder.

5. **ATTORNEY GENERAL**—*representative of the public.* Where the public is interested in the execution of a trust, the Attorney General is a proper party, either plaintiff or defendant, as the representative of the public.

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Statement of the case.

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WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This was a bill in chancery, brought by the Newberry Library, a corporation organized under the laws of Illinois, to obtain a construction of certain provisions of the will of Walter L. Newberry, deceased. The Attorney General of the State of Illinois being made a party defendant, interposed a demurrer to the bill, and his demurrer being overruled, and he having elected to abide by his demurrer, a decree was entered in accordance with the prayer of the bill. The decree being taken to the Appellate Court was affirmed, and to obtain a review by this court of the judgment of affirmance, the Attorney General now brings the record here by writ of error. The facts are sufficiently stated by the Appellate Court, and are substantially as follows:

"This suit was brought in the circuit court of Cook county by the Newberry Library, a corporation organized under the laws of the State of Illinois, against the Attorney General of the State of Illinois, to obtain the instruction and direction of a court of chancery as to whether certain limitations on the powers of the trustees of the estate of Walter L. Newberry, deceased, limiting the powers of said trustees during the administration and management of the said trust, continue to exist as limitations after the distribution of said estate, and what is the effect upon the provisions of said will imposing such limitations, of section 4 of the act of the legislature of the State of Illinois, entitled 'An act to encourage and promote the establishment of free public libraries in cities, villages and towns of this State,' approved June 17, 1891, in force July 1, 1891.

"Walter L. Newberry, of the city of Chicago, county of Cook, and State of Illinois, died November, 1868, leaving a last will and testament, which was subsequently admitted to



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Statement of the case.

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probate in the county court of Cook county, Illinois, and by the terms of which will, Mark Skinner and Eliphalet W. Blatchford were appointed as trustees to control and manage his estate left to said trustees, until the final distribution thereof, as directed by the will. Among the powers given to the trustees while managing and administering the trust, was the power to make leases of the real estate belonging to the trust for terms not exceeding twenty years. The clause limiting such power is as follows: 'If, in the opinion of my said trustees, it would be for the best interests of my estate, in order to secure valuable improvements to be made upon any unimproved lot or land belonging to my estate, to lease said lot or lands for a longer period than five years, then my will is, and I hereby direct, that my said trustees lease and demise the same for any period longer than five years, but not exceeding the period of twenty years, as they may see fit.'

"Another limitation on the power of the trustees is the limitation directing what investments shall be made by the trustees, and is as follows: 'In making investment of money that may, from time to time, come into the hands of my trustees, etc., it is my wish, and I direct, that my said trustees invest the same, either in the securities of the United States of America, or of the State of Illinois, or of the county of Cook, or of the city of Chicago, or in loans secured by bond or mortgage on good, improved, unincumbered real estate in the city of Chicago, worth, in their judgment, at least twice the amount of the money loaned and secured thereon, the land to be worth, without improvements, at least as much as the amount loaned upon such improved property; it being my intention that my said trustees may invest in any or all of said securities as they may see fit, but in none other; and in purchasing bonds of the United States, State of Illinois, county of Cook or city of Chicago, to pay therefor the market price at the time and times of making such purchase.'

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Statement of the case.

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"By the terms and provisions of the will, the time for final distribution and division of the estate of the decedent was postponed until the death of the widow and two daughters of the decedent, and the provisions of the will relative to the founding of a free public library were contingent upon the death of the two daughters of the decedent without lawful issue. Until such final distribution and division of the estate the trustees were directed to hold, manage, control and administer the estate, subject to the directions and limitations contained in the will, for the administration of the trust, and upon such final distribution the trustees were directed to convey the estate to the devisees and beneficiaries who should be entitled thereto at the time of such distribution. .

"Subsequently the two daughters of the decedent died without leaving issue. Thereafter the widow of the decedent also died, and the time arrived for the distribution of the estate of the decedent, and such distribution was made as directed in the will. At the time of such distribution, Eliphalet W. Blatchford was the sole surviving and acting trustee under the will of Walter L. Newberry, deceased, and as such trustee he held the title to a large number of lots, pieces and parcels of land located in the city of Chicago, and a large amount of personal property, and upon such distribution one-half part of the estate was conveyed to the devisees entitled thereto by the terms of the will, and one-half part thereof was set apart and applied by Eliphalet W. Blatchford, as sole surviving trustee, towards the purposes designated in the will, namely, to the founding of a free public library in the North Division of the city of Chicago.

"On June 17, 1891, an act was passed by the legislature of the State of Illinois, entitled 'An act to encourage and promote the establishment of free public libraries in cities, villages and towns of this State,' approved June 17, 1891, in force July 1, 1891. For the purpose of carrying out the object aforesaid, as designated in the will, namely, the founding

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Statement of the case.

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of a free public library in the North Division of the city of Chicago, Eliphalet W. Blatchford, sole surviving trustee, caused the Newberry Library to be organized under the act aforesaid, on April 13, 1892, and conveyed to such corporation all the real estate and personal property before that time by him set apart for the purpose aforesaid, and the same was accepted by the corporation. This was done under the provisions of the will as to the founding of a free public library, which are as follows: 'The other share of my estate shall be applied by my said trustees, as soon as the same can consistently be done, to the founding of a free public library, to be located in that portion of the city now known as the North Division. And I do hereby authorize and empower my said trustees to establish such library, on such foundation, under such rules and regulations for the government thereof, appropriate such portion of the property set apart for such library to the erection of proper buildings and furnishing the same, and such portion to the purchase and procurement of books, maps, charts, and all such other articles and things as they may deem proper and appropriate for a library, and such other portion to constitute a permanent fund, the income of which shall be applicable to the purpose of extending and increasing such library, hereby fully empowering my said trustees to take such action in regard to such library as they may judge fit and best, having in view the growth, preservation, permanence and general usefulness of such library.'

"Section 4 of the said act of the legislature of the State of Illinois is as follows: 'Organizations formed under this act shall be bodies corporate and politic, to be known under the names stated in the respective certificates of articles of incorporation, and by such corporate names they shall have and possess the ordinary rights and incidents of corporations, and shall be capable of taking, holding and disposing of real and personal estate for all purposes of their organization. The provisions of any will, deed or other instrument by which

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Statement of the case.

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endowment is given to said library, and accepted by said trustees, managers or directors, shall, as to such endowment, be a part of the organic and fundamental law of such corporation,' etc.

"By reason of this section of the statute, and the provisions of the will and codicil, the power of the Newberry Library to give leases of its real estate for terms in excess of twenty years has been questioned, and although it has had frequent applications for such leases, it is embarrassed by such question, and can not negotiate therefor, and can not obtain such large rentals as it might obtain were it not for such question as to its powers, and it has been compelled to decline to negotiate with parties desiring such leases who would be willing to pay large rentals were such doubt as to its power removed. The corporation has also, from time to time, had opportunity to make desirable investments other than those set forth in the will, and is unable to take advantage of the same and negotiate therefor by reason of doubt as to its powers as set forth in the will, and thereby it has lost, and will continue to lose, large profits and gains to the charitable beneficiaries of the charity it represents. The bill therefore asked the instructions and directions of the court in the premises, that it might be adjudged that such limitations on the powers of the trustees to make leases to periods of twenty years, and the limitations on the powers of the trustees to make investments as set forth in the will, were temporary and incidental, only, and were only designed to control the trustees under the will during the continuance and management of the trust, and ceased to exist on the final distribution of the estate, and that when the property was conveyed to the Newberry Library, the Newberry Library received and took the same free of and discharged from such limitations, and that such limitations, being only temporary, did not become a part of the organic and fundamental law of the Newberry Library.

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Statement of the case.

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"The Attorney General of the State of Illinois, being duly served with a copy of the bill, entered his appearance and filed a general demurrer. Subsequently the demurrer was overruled and a decree entered, whereby the court found the complainant entitled to relief, and declared that according to a true construction of the will of Walter L. Newberry, deceased, the limitations therein, whereby the trustees were only authorized to make leases for periods not exceeding twenty years, and whereby the trustees were limited to the investments specified in the will, were confined to the period of the administration and management of the trust confided to the trustees, and continued only up to the final distribution and division of the estate of the decedent, and no longer, and that upon the organization of the Newberry Library under the act of the legislature, entitled 'An act to encourage and promote the establishment of free public libraries in cities, villages and towns,' approved June 17, 1891, and in force July 1, 1891, and the conveyance to the corporation by Eliphalet W. Blatchford, surviving trustee under the will, of the one-half part of the property applied and set apart for the founding of a free public library, the provisions of the will limiting the power of the trustees under the will to make leases of real estate of the decedent for periods of twenty years, and the limitation on the power of the trustees to make investments, as specified in the will only, ceased to exist, and did not become parts of the organic and fundamental law of the corporation. The court therefore ordered, adjudged and decreed that the complainant holds the estate and property conveyed and transferred to it by Eliphalet W. Blatchford, surviving trustee under the will of Walter L. Newberry, deceased, and the proceeds thereof, free from the restrictions and limitations contained in the will and codicil, relative to leases and investments, and that the complainant has the same powers over the estate and the proceeds thereof that it would have if the restrictions in the will and codicil in regard to leases and in-

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Statement of the case.

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vestments did not exist. The Attorney General, plaintiff in error, brings this writ of error to this court."

The Appellate Court, after stating the facts as above, rendered the following opinion:

WATERMAN, J.: "It is one of the well recognized functions of courts of equity, wherever there is any *bona fide* doubt as to the true meaning of an instrument creating a trust, to, at the suit of the trustee brought for that purpose, give a judicial construction to the instrument, and direction to the trustee as to his powers and duties thereunder. *Attorney General v. Haberdashers' Co.* 1 Ves. Jr. 295; *In re Shaw's Trusts*, L. R. 12 Eq. 124; Perry on Trusts, sec. 746; Pomeroy's Eq. Jur. secs. 1064, 1156; *Bailey v. Briggs*, 56 N. Y. 407.

"Where the public is interested in the execution of a trust, the Attorney General is the proper party, either plaintiff or defendant, as the representative of the public. Barbour on Parties, 468, 661; Tudor's Law of Charitable Uses, 161; Perry on Trusts, sec. 773; *Hunt v. Chicago and Dummy Railroad Co.* 20 Ill. App. 282; *Jackson v. Phillips*, 14 Allen, 539; *Fund Association v. Beckman*, 21 Barb. 565.

"The principal question presented in this case is, whether the limitation as to the length of time for which leases of real property, and the restrictions upon the character of investments to be made by trustees of the will, continue after the property has passed out of the hands and control of such trustees.

"By the will the estate was divided, substantially, into two principal shares or classes. One of these was, after the happening of certain events, to be distributed to various individuals, relatives of the testator; the other share of the estate was to be applied by his trustees to the founding of a free public library. The testator foresaw that, as happened, a considerable number of years might elapse before his trustees could distribute the estate in accordance with the provisions of the will, and he also realized that the arrival of the period of

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Statement of the case.

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distribution was uncertain, and might come within the term of twenty years. In order, therefore, to provide that the title to real estate, when divided at the period of distribution, should not be encumbered by too long leases, he, while giving, in many respects, the most ample powers of disposition to his trustees, restricted them, in the matter of leasing, to the making of leases for a period not exceeding twenty years; and foreseeing the desirability that the personal part of the estate should, at the arrival of the time for distribution, consist of readily convertible assets having a well recognized market value, he provided that the trustees of the will should make investments of only certain kinds.

"The numerous individuals who were the objects of the testator's bounty, it is manifest, take, at the distribution of the estate, an absolute ownership, free of any control of the trustees, but take the distributed estate in the condition in which the trustees, in accordance with the terms of the will, have placed it. So, too, the share to be applied for the founding of a free public library, when so applied, was to belong absolutely to such library, freed from all control of the trustees appointed to execute the will.

"The trustees, under the will, had two things to do, viz., to manage and to distribute the estate. When the appointed time for distribution came, and the estate was distributed, their functions as trustees of the will ended. In accordance with the will they have given over the share to be used for the founding of a free public library to a corporation created for the purpose of receiving such share and administering it in accordance with the testator's direction in that regard. There is in the will no provision as to how any of the individuals who took under this will were to manage their portions, and there is no direction as to the manner in which the property devoted to the founding of a free public library is to be managed. The setting apart of a portion as a permanent fund to provide an income for the purpose of extending and

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Opinion of the Court.

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increasing the library is mentioned, but no directions as to its amount or management are given.

"The provisions of the will limiting leases of lands to twenty years and the restriction as to the character of investments, are applicable to the entire estate. They affect the shares of individuals as much as the share devoted to library purposes. Such provisions have nothing to do with any portion of the estate after its distribution by the trustees of the will.

"Section 4 of the act under which appellee became an incorporated entity does not add to the duties of the trustees of this will. It does make the clause of the will providing for the founding of a free public library a part of the law of appellee's being, and appellee, under the provisions of said section 4, can not transform the library into a book repository, not free, or remove it from the North Division of the city of Chicago. It is bound to effectuate the testator's desires in this regard. It is not bound, in the management of its income fund, to pay heed to the restrictions put upon the trustees, from whom, in the due course of administration, it received the fund.

"The decree of the circuit court entered upon overruling the demurrer of the Attorney General to the bill is affirmed."

Mr. M. T. MOLONEY, Attorney General, *pro se*.

Mr. DAVID FALES, for the defendant in error.

PER CURIAM: After carefully considering the questions presented by this record, we are disposed to adopt the reasoning and conclusions of the Appellate Court, and to affirm the judgment of that court upon the grounds stated in the opinion delivered by Mr. JUSTICE WATERMAN.

*Judgment affirmed.*



## Syllabus.

JOHN T. DAVIS

v.

ALFRED N. DALE.

*Filed at Ottawa May 8, 1894.*

1. **FORECLOSURE—right to possession and rents after sale, until redemption expires.** The grantor in a deed of trust, or the owner of the equity of redemption, is entitled to the possession of the premises, and to receive the rents, issues and profits, after the sale on foreclosure, and until the time of redemption expires.

2. **SAME—appointment of receiver.** The only purpose of appointing a receiver at the instance of the mortgagee or *cestui que trust*, or trustee in a trust deed, is to preserve the security of the mortgage or trust deed, and apply the rents, issues and profits, when necessary, in discharge of the indebtedness.

3. **SAME—continuing receiver after sale.** It follows, that when the mortgaged premises are bid off at a foreclosure sale for the full amount of the decree, interest and costs, the necessity for continuing the receiver ceases, and he should be discharged, and the possession restored to the owner of the equity of redemption. In any event, the possession of the receiver, and his receipt of the rents and profits arising from the property, would be for the benefit of the person entitled to the same.

4. **SAME—sale—rights of purchaser.** By law, the purchaser at foreclosure sale becomes entitled to all the right, title and interest of the mortgagor in the premises, if no redemption is made in the time and manner prescribed by the statute, and takes the estate charged with all the infirmities of title, and subject to all prior liens, to which it would have been subject in the hands of the mortgagor.

5. Such purchaser is bound to know that the mortgagor is entitled to the possession and rents, issues and profits of the premises pending the running of the period of redemption, and that taxes will accrue which will be a lien upon the property before the time of redemption will expire.

6. **MORTGAGE—lien discharged by sale.** By virtue of the lien created, the mortgagee or *cestui que trust* has the right to have the security foreclosed and the property sold, and the proceeds applied in payment of the secured debt. But when this is done, and the lien enforced by a sale of the property and the proceeds applied, the mortgage or trust deed has expended its force, and the property is no longer subject to its provisions.

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60a	646
150	239
63a	425

150	239
72a	646
72a	647

150	239
174	151
74a	438
76a	423

150	239
78a	228

150	239
178	535
80a	265

150	239
83a	518

150	239
84a	609

150	239
181	446
181	558
181	561

150	239
186	*526

150	239
90a	*406
90a	*425

150	239
92a	*879

150	239
96a	*208
97a	*581

150	239
198	*486

150	239
196	*256

150	239
201	*519

150	239
202	*162
202	*175
202	*176

150	239
108a	*268

150	239
209	*581

150	239
115a	*181

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Statement of the case.

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7. Nor does it in any way affect the result that the holder of the indebtedness becomes the purchaser at the sale, whether he be the mortgagee or *cestui que trust*, or not. By becoming the purchaser a new relation created by the statute exists, in nowise dependent upon any privity of contract between the purchaser and mortgagor.

8. **REDEMPTION**—*payment of taxes and assessments.* Where the purchaser of land at a sale under a judgment or decree shall pay taxes or assessments which become a lien during the time allowed for redemption, and the premises are redeemed, such taxes or assessments so paid, with interest, are, under the statute of 1889, to be included in and paid as part of the money required to make the redemption. This is for the reason that the payment inures to the benefit of the mortgagor and to the preservation of his estate. The reason does not apply where there is no redemption.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

Appellant, being the legal holder of a note secured by trust deed upon certain property in Chicago, the title to which was in one Duncan, during his life, on August 26, 1891, filed his bill to foreclose said trust deed. On October 6, 1891, a receiver was appointed in said cause, with full power to take possession of the property, to rent the same, and to receive rents, etc. Decree of foreclosure was entered for the full amount of the debt and interest, and on December 21, 1891, the premises were sold by the master under said decree, and the complainant (appellant) became the purchaser for the full amount of the decree, interest and costs. A certificate of purchase, in the usual form, was issued to the purchaser, entitling him to a deed at the expiration of fifteen months, in default of redemption.

The trust deed foreclosed, provided that the grantors should pay the taxes and assessments levied upon the property described in the trust deed, and should not suffer the premises, or any part thereof, to be sold or forfeited for any tax or assessment, etc., and that upon default in the performance of

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Statement of the case.

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any of the covenants of the deed, the trustee, or other person appointed by the court, etc., may enter and take possession of the premises, collect the rents, issues and profits, and apply the same toward payment of repairs, taxes, assessments, etc.

After the sale, motion was made by appellee to discharge the receiver, but no action was taken thereon, and the receiver was continued until after the expiration of the time of redemption, and the deed made to appellant by the master. The receiver then made his final report, showing a balance in his hands derived from the rents of the premises.

The deed was made March 21, 1893, and the receiver having collected \$285.99 after redemption had expired and the deed issued, the court ordered the same paid to appellant. The receiver reported that he had paid the taxes upon the property for the year 1891, amounting to \$1574.80, and that there was a net balance in his hands, less commissions, after having paid the several amounts theretofore ordered by the court to be paid to appellee, as executor of Duncan, the sum of \$2074.21, and asked an order for disbursement.

Appellant filed his petition, showing, among other things, that there had accrued taxes upon the property sold by the master, for the year 1892, the sum of \$1657.64, and praying that the receiver be ordered to pay the same. The court, among other things, found and decreed that the receiver should pay the complainant \$1473.50, "being that portion of the taxes for the year 1892 estimated and apportioned as ten and two-thirds months from the first day of May, 1892, to the 22d day of March, 1893." Appellee excepted to so much of the order as required the receiver to pay such proportion of the taxes of 1892, and on appeal to the Appellate Court so much of the decree was reversed and the cause remanded, with directions to the court below to enter an order requiring the receiver to pay the same to appellee as executor, etc. From that judgment of the Appellate Court complainant appeals.

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Briefs of Counsel. Opinion of the Court.

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Mr. FRANKLIN P. SIMONS, for the appellant:

Even after sale it is competent for the court to appoint a receiver to take possession of the rents and profits for the benefit of the mortgagee, upon it being shown that the land mortgaged is not an adequate security, and that the mortgagor, or other party in possession, is insolvent. *Hughes v. Hatchett*, 55 Me. 634; *White v. Griggs*, 54 Iowa, 650; *Warner v. Gouveneur*, 1 Barb. 38; *Douglas v. Cline*, 12 Bush, 608; *Brown v. Chase*, 1 Wells, 43; *Schreiber v. Cary*, 48 Wis. 208; *Haas v. Building Society*, 89 Ill. 498; *Wright v. Vernon*, 3 Brew. 112.

A purchaser at a sheriff's or master's sale acquires only a lien. No new title vests until the period of redemption expires. *Stephens v. Insurance Co.* 43 Ill. 328.

The appellee bound himself, under the covenants of the trust deed, to pay the taxes, and so agreeing, the circuit court directed a part of the funds coming into the hands of the receiver to be used for that very purpose. *Stephens v. Insurance Co. supra*; *Pensoneau v. Pulliam*, 47 Ill. 58; *Davis v. Dresback*, 81 id. 393; *Insurance Co. v. White*, 106 id. 67.

Messrs. DEFREES, BRACE & RITTER, for the appellees:

The rents and profits during the time intervening between the master's sale and deed belong to the owner of the equity of redemption. *Stephens v. Insurance Co.* 43 Ill. 328; *Bennett v. Matson*, 41 id. 332; *O'Brian v. Fry*, 82 id. 274.

The mortgagor has the right to remain in possession until the purchaser becomes entitled to his deed, and is not liable for use and occupation, nor to account for the rents and profits. *Rockwell v. Servant*, 63 Ill. 424.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The question presented upon this record is, whether the circuit court correctly decreed requiring the receiver to pay taxes for the year 1892 on the mortgaged premises.

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Opinion of the Court.

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The grantor in the deed of trust, or the owner of the equity of redemption, was entitled to the possession of the premises, and to receive the rents, issues and profits thereof, after the sale and until the time of redemption expired. (*Stephens v. Insurance Co.* 43 Ill. 331; *Bennett v. Matson*, 41 id. 332; *O'Brian v. Fry*, 82 id. 274; *Rockwell v. Servant*, 63 id. 424.) The only purpose of appointing a receiver at the instance of the mortgagee or *cestui que trust* under or trustee in the trust deed, is to preserve the security of the mortgage or trust deed, and apply the rents, issues and profits, when necessary, in discharge of the indebtedness. And it follows, necessarily, that where the property is bid off at the foreclosure sale for the full amount of the decree, interest and cost, as was here done, the necessity for continuing the receiver ceases, and he should be discharged and the possession restored to the owner of the equity of redemption. In any event, the possession of the receiver, and his receipt of the rents and profits arising from the property, would be for the benefit of the person entitled to the same, so that the parties acquired no additional right because the fund is in the hands of the receiver.

The contention of counsel for appellant, that in some way the purchaser at the master's sale acquired equities, under the clauses and covenants of the trust deed, for the payment of taxes by the grantor, is equally untenable. By virtue of the lien created, the mortgagee or *cestui que trust* had the right to have the security foreclosed and the property sold, and the proceeds applied in payment of the secured debt. But when this has been done, and the lien enforced by a sale of the property and the proceeds applied, the mortgage or trust deed has expended its force, and the property is no longer subject to its provisions. (*Ogle et al. v. Koerner et al.* 140 Ill. 170; *Seligman v. Laubheimer*, 58 id. 124.) Nor does it in any way affect the result that the holder of the secured indebtedness becomes the purchaser at the sale, whether he be the mortgagee or *cestui que trust*, or not. By becoming the purchaser,

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Opinion of the Court.

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a new relation created by the statute exists, in nowise dependent upon any privity of contract between the purchaser and mortgagor.

No cross-errors are assigned, nor is the correctness of the decree in respect of the payment of taxes of 1891 in any way questioned. It is difficult to see how the purchaser at the master's sale would, in the condition of this case, be entitled to payment of such taxes out of the rents and profits. But, as before said, the question is not raised, and need not be now determined.

By the statute the owner of the real estate on the first of May, in any year, is made liable for the taxes of that year. (Rev. Stat. sec. 59, chap. 120.) No determination of the question of whether the mortgagor was the owner on the first of May, 1892, which, it will be remembered, was practically four months after the sale by the master, will be required. Nor would his liability to the State for the taxes of that year, if it existed, be at all determinative of the question here involved. The purchaser at the sale took as a stranger whatever title was authorized by the decree to be sold. By law he became entitled to all the right, title and interest of the mortgagor in the premises, if no redemption was made in the time and manner prescribed by the statute, and necessarily took the estate charged with all the infirmities of title, and subject to all prior liens to which it would have been subject in the hands of the mortgagor. He was required to know that the mortgagor would be entitled to the possession, and rents, issues and profits, of the premises pending the running of the period of redemption, and that taxes would accrue, which would be a lien upon the property, before the time of redemption would expire, and he voluntarily purchased subject to such accruing lien. The legislature, in recognition of this, passed the act of June 4, 1869, by which it is provided, that where the purchaser of real estate at a sale under a judgment or decree shall pay taxes or assessments which became a lien during the

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Syllabus.

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time allowed for redemption, and the premises are redeemed, such taxes or assessments so paid, with interest, are to be included in and paid as part of the money required to make the redemption. This is manifestly just, for the reason that, the redemption being made, the payment of the taxes inures to the benefit of the mortgagor and to the preservation of his estate, and this undoubtedly led to the enactment. No such reason, however, exists where no redemption is made. There, the payment of taxes inures to the benefit of the purchaser, and can in nowise be beneficial to the mortgagor.

The judgment of the Appellate Court is affirmed, and the cause remanded to the circuit court, with directions to carry into effect the remanding order of the Appellate Court.

*Judgment affirmed.*

Mr. JUSTICE CRAIG, dissenting.

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THE TRADERS' INSURANCE COMPANY

v.

A. L. PACAUD *et al.*

*Filed at Ottawa May 8, 1894.*

1. **INSURANCE**—*whether an insurable interest.* A and B were engaged in the grain business, and were operating an elevator, which was owned by A, who also owned the ground on which it was located. B advanced no money to carry on the business, but under an arrangement with A he took charge of the business at the elevator, and was to receive as a salary one-half of the profits realized out of the business. B's liability with A to the party owning grain stored in the elevator, to hold and ship the grain to such owner or to his order, as provided in the warehouse receipts, and his right to share in the profits in payment of his salary, was held an insurable interest upon the property, upon which he could take out a policy for his own benefit.

2. **SAME**—*who may sue on policy.* Where a party contracts for the insurance of property, pays the premium, and the policy makes the loss payable to him, the agreement to pay the loss is a contract with

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Statement of the case.

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the person who pays the consideration, and he will have a right of action in his own name, although the insurance is in the name of another.

3. A and B, the owners of grain stored in an elevator, took a policy of insurance on the grain to C, of the firm of C & D, the parties with whom the grain was stored, which policy provided that the loss, if any, should be paid to A and B, as their interest may appear. A and B alone applied for the insurance, and they alone paid the premium, and the policy was delivered to them: *Held*, that A and B could maintain an action in their own names for any loss that might occur.

4. *SAME—limited interest in property insured—duty to disclose real interest.* A policy of insurance provided that if the interest of the assured in the personal property should be "other than unincumbered ownership, without such fact being indorsed upon the policy, the same should be void." The policy was to M., of the firm of M. & B., warehousemen, with whom the property was stored, and contained a clause that loss should be payable to P. & Co., as their interest might appear. B had no title to the property, but only an interest in the profits of the business of buying and storing grain, and was liable with M to hold and ship the grain, as provided in the warehouse receipts issued by M. & B.: *Held*, that while B had an insurable interest in the grain stored, his interest was not one which the assured were required to disclose when they took out the policy.

5. *SAME—contribution in case of other insurance.* A condition in a policy of insurance which provides that in case of any other insurance upon the property insured, made prior or subsequent to the policy, the assured should be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured thereon, has no application where the other insurance is of a separate and distinct interest in the property. It applies only where the insurance covers the same interests.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JAMES GOGGIN, Judge, presiding.

This was an action brought by A. L. Pacaud and George W. Pacaud, a firm doing business under the name and style of A. L. Pacaud & Co., against the Traders' Insurance Company, on a policy of insurance issued by the defendant to J. H. Million, of the firm of Million & Bott, doing business at Kahoka, in the State of Missouri, for the sum of \$3500, with



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Statement of the case.

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the recital therein, "loss, if any, payable to A. L. Pacaud & Co., as interest may appear."

It appears from the record that the policy of insurance was issued on the 25th day of November, 1890, and that prior to the issuing of the same, John H. Million and John A. Bott were engaged in the grain business, and were running and operating an elevator at Kahoka, in the State of Missouri, and that the policy was taken out to cover the interest of the plaintiffs in the grain in the elevator at the time it was destroyed by fire, on the 16th day of December, 1890. The firm of Million & Bott had been engaged in the business of buying and shipping grain for several years before the destruction of the elevator by fire, and some months before the fire the plaintiffs had made advances to Million & Bott, so that at the date of the fire the advances made by them, for which they held warehouse receipts of the firm of Million & Bott, amounted to the sum of \$6200. It further appears that at the date of the fire the firm of Million & Bott had in the elevator at Kahoka, corn amounting to 6858 bushels, and 2406 bushels of wheat.

The policy was issued on the application of plaintiffs, and the premium paid by them. Million & Bott had nothing whatever to do with it, and, so far as appears, no connection with it. They held policies, which they had taken out in their own names, on the grain, amounting to some \$6700, payable to themselves. The plaintiffs, A. L. Pacaud & Co., first began making advances to Million & Bott on May 1, 1890, and these advances continued during the summer and fall, until they aggregated the sum of \$6200. With these advances Million & Bott purchased grain and stored it in their elevator at Kahoka, Missouri, and in return for these advances A. L. Pacaud & Co. received warehouse receipts for the grain so purchased, signed by Million & Bott.

The policy contained the following conditions: First, that "if the interest of the assured in the personal property be other than its unincumbered and sole ownership, without such fact

## Brief for the Appellant.

being indorsed upon the policy, the same shall be void." Second, "in case of any other insurance upon the property hereby insured, whether valid or not, or made prior or subsequent to the date of this policy, assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount so insured thereon; and it is hereby agreed, that in case of assured holding any other policy, in this or any other company, on the property insured, subject to conditions of average, this policy shall be subject to average in like manner. Any insurance, floating or otherwise, attaching in whole or in part to the property covered by this policy, shall, as between assured and this company, be considered as contributing insurance for the full amount thereof, and liable, as such, to pay *pro rata* any loss, total or partial, on the property hereby insured."

MESSRS. SCHUYLER & KRAMER, for the appellant:

The plaintiffs could not insure their interest in the partnership property of Million & Bott in the name of J. H. Million, and the policy was void. Ostrander on Law of Insurance, 261; *Insurance Co. v. Resh*, 44 Mich. 241; *Insurance Co. v. Salt Co.* 31 id. 347; *Insurance Co. v. Brennan*, 58 Ill. 159; *Welsh v. Insurance Co.* 23 W. Va. 288; *Boulette v. Insurance Co.* 51 Vt. 4.

The court erred in ruling and instructing the jury that the defendant was not entitled to contribution, on the basis that the policy was taken out by Million & Bott on the property and assigned to the plaintiffs. *Insurance Co. v. Warehouse Co.* 93 U. S. 545; 2 May on Insurance, (3d ed.) sec. 434; *Bradwell v. Insurance Co.* 122 Mass. 90; *Insurance Co. v. Hazlett*, 105 Ind. 126; *Good v. Insurance Co.* 43 Ohio St. 394; *Chesbrough v. Insurance Co.* 61 Mich. 333; *Manufacturing Co. v. Insurance Co.* 88 N. Y. 592.

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Brief for the Appellees. Opinion of the Court.

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Mr. ROBERT RAE, for the appellees :

The intention of the parties must interpret the contract of insurance. *Dix v. Insurance Co.* 22 Ill. 277.

The instruction given on behalf of the plaintiffs was justified under the ruling in *McMasters v. Insurance Co.* 55 N. Y. 222, and *The Insurance Co.* 81 id. 415.

As to the rule requiring contribution, see *Insurance Co. v. Scammon*, 144 Ill. 490; *Acer v. Insurance Co.* 57 Barb. 68; *Fox v. Insurance Co.* 52 Me. 333; Phillips on Insurance, sec. 359.

The assured can not be charged for the acts of third persons over whom he has no control. *Assurance Co. v. Scammon*, 126 Ill. 355; *Carpenter v. Insurance Co.* 16 Pet. 501; *Nichols v. Insurance Co.* 1 Allen, 63; *Burbanks v. Insurance Co.* 24 N. H. 551.

Mr. JUSTICE CRAIG delivered the opinion of the Court :

The principal grounds relied upon to reverse the judgment of the Appellate Court, affirming the judgment of the circuit court, are the following: First, that the interest of J. H. Million in the property destroyed by fire, and covered by the defendant's policy, was other than its unincumbered and sole ownership, and that he had no insurable interest therein in his own name; and second, that the court erred in not instructing the jury that all the insurance on the property at the date of the fire should contribute to the loss, and the plaintiff could only recover from the defendant its proportionate share of such loss.

Under the first point relied upon, it is said that the property covered by the insurance was owned by the firm of Million & Bott, and hence the title was not in J. H. Million, and his interest was not of an unincumbered and sole ownership, within the meaning of the policy. While the grain business at Kahoka was transacted in the name of Million & Bott, upon

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Opinion of the Court.

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looking into the evidence in the record it will be found that Bott had no real title to the grain covered by the policy. The elevator where the business was transacted, and the ground upon which it was located, were owned by J. H. Million. Bott advanced no money to carry on the business, but under an agreement with Million he took charge of the business at the elevator, and was to receive as a salary one-half of the profits realized out of the business. Under this arrangement Bott can not be regarded as a real owner of the title to one-half of the grain in the elevator at the time the policy issued. His liability, with Million, to Pacaud & Co. to hold and ship the grain to them or their order, as provided in the warehouse receipts, and his right to share in the profits in payment of his salary, may be regarded as an insurable interest in the property, upon which he could take out a policy for his own benefit. But his interest in the property itself was not one which the plaintiffs were required to disclose when they took out a policy to protect their own interest. Moreover, the provision that the interest of the insured should not be other than an unincumbered and sole ownership in the property insured, in our opinion had no application to Million, but it had reference to the plaintiffs,—the parties who were insured by the policy. The plaintiffs held an insurable interest in the property. They applied to the insurance company for insurance. They, and they alone, made the contract and paid the premium, and the policy was delivered to them containing the following provision: "The Traders' Insurance Company of Chicago, in consideration of \$87.50, do insure J. H. Million against loss or damage by fire to the amount of \$3500, on grain, the assured's property, or held by assured in trust or on commission, or sold, but not delivered, while in the Kahoka elevator at Kahoka, Missouri, loss, if any, payable to A. L. Pacaud & Co., as interest may appear."

While the decisions in the different States may not be entirely harmonious in regard to the person who holds the legal

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Opinion of the Court.

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interest and in whose name an action may be maintained, yet, as we understand the subject, the decided weight of authority is, where the party contracts for the insurance, pays the premium, and the company makes the loss payable to such party, the agreement to pay is a contract with the person who pays the consideration, and he has a right of action in his own name, although the insurance is in the name of another. *Hathaway v. Orient Ins. Co.* 134 N. Y. 409, is a late case on the subject. In *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121, it was held that the person who pays the premium and to whom the loss is payable is the party to sue for the loss. The ground upon which the person to whom loss is payable may maintain a suit in his own name, would seem to be predicated on the fact that he has the legal interest in the contract, and in order to have the legal interest in the contract he must be the party insured.

It will be observed that the policy provided that in case of any other insurance upon the property insured, made prior or subsequent to the policy in suit, assured shall be entitled to recover of the company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount so insured therein. It appears from the testimony that Million & Bott had procured insurance on the property in their own names, amounting to some \$6700, which was in force at the time of the fire, in addition to the policy held by plaintiffs, and under the clause of the policy providing for contribution it is claimed by appellant that plaintiffs could, in no event, recover the full amount of the policy. The plaintiffs had no connection whatever with the policies issued to Million & Bott. Those policies were procured by Million & Bott for their own and sole benefit, and the loss, in case of fire, was payable to them. Under such circumstances, was the appellant entitled to claim an apportionment? The appellant had the right to rely on an apportionment in case of other insurance upon the property. The question resolves

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Opinion of the Court.

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itself into this: Was there other insurance upon the property, within the meaning of the policy? We think it plain there was not. We think the provision for apportionment of loss if there should be other insurance, applies only where the insurance covers the same interest. That was not the case here. The plaintiffs insured their interest in the property and Million & Bott insured their interest. The one was separate and distinct from the other. The case is not different from what it would be if the two parties occupied the relation of mortgagor and mortgagee, where each may insure his own interest, and the insurance obtained by one has no connection with the insurance obtained by the other.

But if there was a doubt in regard to the question, we think it was settled by *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 500. It is there said: "It is to be noted that the provision for an apportionment is only to become operative if there shall be other insurance upon the property, and, as we have seen, insurance which is obtained by a third person, and upon another distinct and insurable interest, can not be regarded as other insurance. We understand the rule to be, that a provision for apportionment of loss if there is other insurance, applies only to cases where the insurance covers the same interest." See, also, *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *The Insurance Co.* 81 N. Y. 415; *Fox v. Insurance Co.* 52 Me. 333; Phillips on Insurance, sec. 359.

The policies obtained by Million & Bott were, after the fire, assigned to the plaintiffs, but that fact has no special bearing on the case.

We find no substantial error in the record, and the judgment will be affirmed.

*Judgment affirmed.*

MR. JUSTICE BAILEY, dissenting.

## Syllabus. Statement of the case.

WILLIAM F. FISHER *et al.*

v.

CHARLOTTA A. SPENCE *et al.**Filed at Mt. Vernon May 5, 1894.*

150	253
188	473
150	253
174	568
150	253
183	44
150	253
184	582
184	584
150	253
187	94

1. **WILLS—competency of attesting witnesses—husband or wife of devisee.** The husband or wife of one to whom a devise or legacy is given by a will is not a competent witness to prove the execution of the will, and is not rendered competent by the release by the devisee of all his rights under the will. Such attesting witnesses are not competent as to devises and bequests made to persons other than to the wife or husband of either of said witnesses.

2. **SAME—subscribing witnesses—statute construed.** Section 8 of the Statute of Wills, which declares that “if any beneficial devise, legacy or interest shall be made or given in any will, testament or codicil, to any person subscribing such will, testament or codicil as a witness of the execution thereof, such devise shall, \* \* \* as to such subscribing witness, and all persons claiming under him, be null and void,” has no application to the interests of any persons other than those who are attesting witnesses, and does not declare such interests null and void. Nor does the statute assume to render competent any subscribing witnesses other than those to whom a beneficial devise, etc., was made or given.

3. The only devises declared void by this statute are beneficial devises to a subscribing witness. It does not avoid even a devise to a subscribing witness which gives him no beneficial interest, as, for instance, a devise to an executor for the exclusive benefit of other persons. Section 5 of the act relating to evidence does not render a husband a competent attesting witness to prove a will making a devise to his wife.

4. **SAME—“credible witnesses”—statute construed.** The expression in section 2 of the Statute of Wills, “credible witnesses,” means competent witnesses. The competency of attesting witnesses to a will is to be tested upon the state of facts existing at the time of such attestation, and not that existing at the time the will is presented for probate.

**APPEAL** from the Circuit Court of Pulaski county; the Hon. R. W. McCARTNEY, Judge, presiding.

On the 25th day of January, 1890, one John A. Fisher made his last will and testament, thereby disposing of all of his real and personal estate to divers persons therein named. The will

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Brief for the Appellants.

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was witnessed by J. J. Carson and Carrie F. Spence. Georgia Ann Carson, the wife of the said J. J. Carson, and Thomas W. Spence, the husband of the said Carrie F. Spence, are devisees and legatees under the will. In the county court the collateral heirs of the said John A. Fisher, deceased, resisted the probate of the will, claiming it to be void because it is witnessed by J. J. Carson and Carrie F. Spence, the husband and wife of the said Georgia Ann Carson and Thomas W. Spence, who are two of the devisees and legatees under the will. Before the probate of the will in the county court, the said Georgia Ann Carson and Thomas W. Spence, the wife and husband of the subscribing witnesses to the will, in the county court, in open court, formally released and renounced all benefits and all legacies and bequests to them under said will. The county court declared the will null and void as to the devises and bequests made to the said Georgia Ann Carson and Thomas W. Spence, but held the will valid, and admitted the same to probate, as to all of the other devises and bequests therein contained. The heirs of the said John A. Fisher, deceased, took an appeal to the circuit court from the order of the county court admitting said will to probate. While the appeal was pending in the circuit court, the said Georgia Ann Carson and Thomas W. Spence, together with their said husband and wife, again released and renounced, in the most formal manner, all their right, title, interest and claim as devisees and legatees under said will. The circuit court made a like order to that of the county court, and the contestants of said will have brought the case to this court by appeal.

Mr. L. N. BRADLEY, and Messrs. GREEN & GILBERT, for the appellants:

Witnesses to a will are placed around the testator to protect him from fraud, and have peculiar powers as to expressing their opinions. 2 Greenleaf on Evidence, sec. 691; 3 Washburn on Real Prop. \*681, 682.



## Brief for the Appellees.

The witnesses to a will should, and must, be competent at the time of the attestation. Schouler on Wills, sec. 35; North on Probate Practice, sec. 44; 2 Greenleaf on Evidence, sec. 691; 3 Washburn on Real Prop. \*682; *Patten v. Tailman*, 27 Me. 27; *Morton v. Ingram*, 11 Ired. 455; *Pease v. Allis*, 110 Mass. 157; *Workman v. Dominick*, 3 Strob. 589; *Stewart v. Harriman*, 66 N. H. 25; *Sullivan v. Sullivan*, 106 Mass. 474.

It is conceded that the wife can not testify for or against the husband, nor the husband for or against the wife, at the common law, except in few cases, and by our statute attesting witnesses to a will remain as at the common law as to a husband or a wife testifying for or against each other. Rev. Stat. chap. 51, sec. 8.

"Credible," as used in the Statute of Wills, means "competent." 1 Redfield on Wills, 253, 254; North on Probate Practice, sec. 44; 1 Greenleaf on Evidence, sec. 272; *Workman v. Dominick*, 3 Strob. 589; *Sullivan v. Sullivan*, 106 Mass. 474; 3 Washburn on Real Prop. \*682.

A will is not valid that is attested by a wife or husband, containing a devise to the husband or wife of one of the attesting witnesses,—that is, if there are not the required number of credible or competent attesting witnesses thereto, without such husband or wife, to establish such will. Schouler on Dom. Relations, 64; 3 Washburn on Real Prop. \*682; *Sullivan v. Sullivan*, 106 Mass. 474; *Hatfield v. Thorp*, 5 B. & A. 589; *Fortune v. Buck*, 23 Conn. 1; 1 Jarman on Wills, 65, 66.

No release can make an incompetent witness competent, for the witness must be competent at the time of the attestation. Rev. Stat. chap. 51, sec. 7.

MESSRS. LANSDEN & LEEK, and MESSRS. ROBERT & WALL, for the appellees:

Where a devise is made to a husband or wife whose wife or husband is an attesting witness, it will be void, and being void, the attesting witness is competent to prove the will.

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Opinion of the Court.

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1 Redfield on Wills, 258; 3 Lomax' Dig. 45; North on Probate Practice, sec. 47; *Jackson v. Durland*, 2 Johns. 314; *Holdfast v. Dowsing*, 2 Strange, 1233; *Winslow v. Kimball*, 25 Me. 484.

The interest of a witness may be removed by release. See 1 Phillips on Evidence, 156; 1 Redfield on Wills, 254; *Lowe v. Jolliffe*, 1 W. Black, 365.

Mr. CHIEF JUSTICE BAKER delivered the opinion of the Court:

The sole question for consideration is, whether or not the said J. J. Carson and Carrie F. Spence are competent witnesses to said will as to all devises and bequests therein contained, except the devises and bequests to the said Georgia Ann Carson and Thomas W. Spence, the wife and husband of the said subscribing witnesses to said will. It is admitted that at common law, and without any relinquishment or release by the said Georgia Ann Carson and Thomas W. Spence of the interests in the estate given to them by the will, they would not be competent attesting witnesses to such will. It is urged, however, that for two reasons they are now competent witnesses to establish the will. One ground of the contention of appellees is, that even if J. J. Carson and Carrie F. Spence were not competent witnesses at the time of attestation of the will, yet that since, prior to the probate of such will, Georgia Ann Carson and Thomas W. Spence, wife and husband, respectively, of said witnesses, released all interest in the estate, they became and were competent witnesses to establish such will. The other contention of appellees is, that under and by virtue of section 8 of our Statute of Wills the devises and legacies to Georgia Ann Carson and Thomas W. Spence under the will to which the husband of the one and the wife of the other were the only attesting witnesses, were null and void, and such husband and wife competent witnesses as to the residue of such will.

It is provided in section 2 of the Statute of Wills, that all wills, testaments and codicils shall be "attested in the pres-

## Opinion of the Court.

ence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of the said will, testament or codicil to admit the same to record." The expression in the statute, "credible witnesses," means competent witnesses. 1 Greenleaf on Evidence, 272; North's Probate Practice, sec. 44; *Workman v. Dominick*, 3 Strob. 589; *In the matter of Noble*, 124 Ill. 266.

The material question upon the claim of appellees first above mentioned is, whether the competency of attesting witnesses to a will is to be tested upon the state of facts existing at the time of such attestation, or upon those existing at the time such will is presented for probate. In our opinion the decided weight of the more modern authorities is in favor of the former proposition. In 2 Greenleaf on Evidence (sec. 691) it is said: "The attesting witnesses are regarded, in the law, as persons placed around the testator in order that no fraud may be practiced upon him in the execution of the will, and to judge of his capacity. They must therefore be competent witnesses at the time of the attestation, otherwise the will is not well executed." He further says, in a note, that such was the opinion of Lord Camden, and that such opinion is now acquiesced in as the true exposition of the Statute of Wills, and he also cites in the note a number of authorities sustaining the doctrine announced in the text. In North's Probate Practice (sec. 44) it is said: "As to the period at which the witnesses must be competent, the weight of the authorities is clearly that it must be at the time of the execution." In Schouler on Wills (sec. 351) it is said that the rule which reason should now pronounce the universal one is, that

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Opinion of the Court.

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the competency of witnesses to a will like that of the testator is tested by one's status at the time when the will was executed. See, also, *Patten v. Tallman*, 27 Me. 27; *Morton v. Ingram*, 11 Ired. 368; *Huie v. McConnell*, 2 Jones, (N. C.) 455; *Vrooman v. Powers*, 47 Ohio St. 191; *Workman v. Dominick*, *supra*; *Pease v. Allis*, 110 Mass. 157. The views above expressed seem to be supported by the decision of this court in *In re will of Ingalls*, 148 Ill. 287. Without mentioning numerous other authorities to the same effect, we may say that our conclusion is that J. J. Carson and Carrie F. Spence were not rendered competent witnesses to the will in question by the releases which were executed by the wife of the one and the husband of the other, releasing all benefits under such will.

As above stated, the other claim of appellees is, that by section 8 of the Statute of Wills the devises and legacies to the wife of one and husband of the other of the attesting witnesses to the will are null and void, and therefore said attesting witnesses competent witnesses as to the residue of the will. Said section 8 is as follows:

"If any beneficial devise, legacy or interest shall be made or given in any will, testament or codicil to any person subscribing such will, testament or codicil as a witness to the execution thereof, such devise, legacy or interest shall, as to such subscribing witness and all persons claiming under him, be null and void, unless such will, testament or codicil be otherwise duly attested by a sufficient number of witnesses exclusive of such person, according to this act; and he or she shall be compellable to appear and give testimony on the residue of such will, testament or codicil, in like manner as if no such devise or bequest had been made. But if such witness would have been entitled to any share of the testator's estate in case the will, testament or codicil was not established, then so much of such share shall be saved to such witness as shall not exceed the value of the said devise or bequest made to him or her, as aforesaid."

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Opinion of the Court.

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It is to be noted that it is only the beneficial devise, legacy or interest that is made or given to a subscribing witness to the execution of any will, testament or codicil that is declared by the language of this statute to "be null and void." In order to hold that this statute has any application to the present case, it would be necessary to read into the statute a provision that any devise or legacy to the wife or husband of a subscribing witness shall be null and void. The ground assumed by appellees, and in the authorities upon which they rely, is, that the statute ought to receive a liberal construction in support of the will, and that on account of the unity of husband and wife, in legal contemplation, it should be held that it is the intent of the statute, that if either husband or wife is a witness to a will containing a devise or a legacy to the other, then such devise or legacy is null and void.

In *Richmond v. Moore*, 107 Ill. 429, it was held, that while it was the duty of the courts to give to all words, clauses and phrases found in a statute a liberal construction, in order to carry out the legislative intention, yet courts have no power to inject provisions into the statute which were omitted by the law-makers. The difficulty that we encounter in respect to the argument made by appellees is, that it does not appear, from the statute under consideration, that the legislature acted, or assumed to act, in regard to the interests of any persons other than those who are attesting witnesses to wills, and declare such interests null and void, or assumed to render competent any subscribing witnesses other than those to whom a beneficial devise, legacy or interest was made or given.

In *Sullivan v. Sullivan*, 106 Mass. 474, the Massachusetts's statute was, that "all beneficial devises, legacies and gifts made or given in any will to a subscribing witness thereto shall be wholly void, unless there are three other competent witnesses to the same," and it was held that a wife is not a competent attesting witness to a will which contains a devise to her husband. In the opinion of the court, delivered by

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Opinion of the Court.

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GRAY, J., it was said: "The only devises which the statute declares to be void are beneficial devises to a subscribing witness. It does not avoid even a devise to a subscribing witness which gives him no beneficial interest, as, for instance a devise to an executor, for the exclusive benefit of other persons. (*Wyman v. Symms*, 10 Allen, 153; 1 Jarman on Wills, 65.) It does not avoid any devise to and for the benefit of any person other than a subscribing witness, even if the subscribing witness would incidentally take some benefit from the devise. In order to maintain the position contended for, it would be necessary to declare void, not merely the interest which the wife, who was a subscribing witness, would take, by way of dower or otherwise, in the property devised to her husband, but also the whole devise to and for the benefit of the husband himself, who was not a subscribing witness, and whose estate the statute does not assume to reach."

In *Fortune v. Buck et al.* 23 Conn. 1, it was said: "That the wife was an interested subscribing witness, and incompetent to sustain the will in favor of her husband, if objected, while the probate of the will was under consideration, we can well see; but how a person, whether a wife or not, can be treated as a devisee to whom nothing is devised, where no statute provides, is not so easily perceived."

Section 8 of our Statute of Wills is substantially the same as the statute of 25 George II, ch. 6. Our attention is called to *Holdfast v. Dowsing*, (sometimes cited as *Antsey v. Dowsing*,) 2 Strange, 1253. In that case Dowsing was devisee of certain lands charged with the payment of an annuity to the wife of one of the witnesses to the will, and it was held, among other things, that the charge upon the real estate of the annuity to the wife made the husband an incompetent witness. The case, although an authority as to what the law is in the absence of any statute, can not be regarded an authority as to the interpretation to be given to section 8 of our Statute of Wills, for the reason it was decided prior to the statute of 25 George II, ch. 6.

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Opinion of the Court.

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Attention is also called to the case of *Hatfield v. Thorp*, 5 Barn. & Ald. 589. The case does not seem to be in point in respect to the question here in issue. The case was, that one John Steemson devised a certain messuage, garden and premises to his daughter, Mary Bell, for life, remainder to Elizabeth Hatfield in fee, and one of the necessary witnesses to the will was the husband of said Elizabeth Hatfield. The Master of the Rolls certified the case to the court for its opinion whether the will was duly attested to pass any estate to Elizabeth Hatfield. The opinion of the court was confined strictly to the question certified to it, and was as follows: "This case has been argued before us, and we are of opinion that the will of the said John Steemson was not duly executed so as to pass any real estate in the messuage, garden and premises to Elizabeth Hatfield." The question whether or not the will was so attested as to pass any estate to Mary Bell, the daughter of John Steemson, was not submitted to the court or passed upon by it. It seems to us that there is no necessary implication, from the opinion, that the court held that the statute of 25 George II either did or did not apply to the case. However, in 1837, parliament, by the statute of 1 Victoria, ch. 26, extended the disqualification to take beneficially under a will to the husband or wife of the attesting witness, and this seems to be a recognition of the fact that legislation further than that contained in the statute of 25 George II was necessary in order to render null and void a beneficial devise or legacy to the wife or husband of an attesting witness to a will, and make such witness a competent witness as to the residue of the will.

Appellees contend that the unity of husband and wife is such, in legal contemplation, as that if either be a witness to a will containing a devise or a legacy to the other, such devise or legacy is void, within the intent of our Statute of Wills, and this contention is supported by decisions of the courts in New York and Maine, made under statutes substantially like ours. (*Jackson v. Wood*, 1 Johns. Cas. 163; *Jackson v.*

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Opinion of the Court.

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*Durland*, 2 id. 314; *Winslow v. Kimball*, 25 Me. 493.) After much consideration, we are inclined to concur in the views expressed in *Sullivan v. Sullivan*, 106 Mass. 474, in regard to said cases. It is there said: "With great respect for the learning and ability of the courts which made those decisions, and after carefully weighing the arguments in support of the construction contended for, we are unanimously of opinion that it is founded rather upon a conjecture of the unexpressed intent of the legislature, or a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the statute by which their intent has been manifested."

It may be suggested that the legacy and devise to Georgia Ann Carson, the wife of J. J. Carson, were the separate property of the wife, and that under section 5 of our Statute of Evidence and Depositions the husband is a competent witness respecting the separate property of the wife. A sufficient answer to this would be, that it is expressly provided in section 8 of that statute that nothing in the statute contained shall in any manner affect the existing laws relating to the settlement of the estates of deceased persons, or to the attestation of the execution of last wills and testaments. Besides this, even if, under said section 5, J. J. Carson was a competent witness to the will, the incompetency of the other witness, Carrie F. Spence, would not be removed, and under our Statute of Wills two or more credible or competent witnesses are required to a will.

In our opinion the county court and the circuit court were in error in holding that J. J. Carson and Carrie F. Spence were competent witnesses to establish the will of John A. Fisher, deceased, and in admitting said will to probate as to all the devises and bequests therein contained, other than those to Georgia Ann Carson and Thomas W. Spence. The judgments and orders of said courts are therefore reversed.

*Judgment reversed.*



## Syllabus.

JACOB HELMUTH *et al.*

v.

SARAH BELL *et al.**Filed at Ottawa May 8, 1894.*130 263  
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1. **INTOXICATING LIQUORS**—*joint liability of seller and owner of premises where sold.* In an action by a widow and her infant children against a saloon-keeper and the owner of the premises where the liquor was sold, to recover damages for a loss of the plaintiff's means of support, caused by the death of their husband and father from intoxication, the allegation of ownership in the premises upon which the liquor was sold makes such owner jointly liable with the seller of the liquor, by the terms of the statute.

2. **SAME**—*causing death of plaintiff's support—joint action by widow and children.* Where a man loses his life through intoxication, having a wife and children of tender years, who live together and constitute but one family, whereby they lose their means of support, while the wife may sue alone, no reason is perceived why the wife and children may not join in an action to recover for the loss.

3. **SAME**—*joint action by parents of the deceased.* If a father and mother living with a son upon whom they are dependent for support, and who is providing for them, are deprived of the same in consequence of the intoxication of the son, it would seem unreasonable to hold that two actions instead of one should be brought by the parents. The words "in his or her own name" may, by the express language of the statute, be read in the plural. Where joint interests are affected a joint action may be brought.

4. **PRACTICE**—*suing jointly—waiver of error by pleading to the action.* Where each of several parties plaintiff has a right of action against a defendant, of the same nature, growing out of the same wrong, even if no joint suit is given by the statute, and the defendant elects to plead to the action so brought, and suffers a verdict and judgment to go against him, he will thereby waive the error.

5. **SAME**—*waiver of objection by failure to make it in time.* An objection which could have been removed in the trial court if made there, can not be urged for the first time in an appellate court.

6. **PRACTICE IN THE SUPREME COURT**—*matters to be considered—absence of bill of exceptions.* In the absence of a bill of exceptions this court can not consider the correctness of the rulings of the trial court, except such errors as appear upon the face of the record proper.

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Opinion of the Court.

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7. **PLEADING**—*defects cured by verdict.* Where a declaration shows that part of the plaintiffs are minors, their failure to sue by guardian or next friend is an error which is cured by verdict, under the Statute of Amendments. So, also, is any other defect in the declaration which is obnoxious to a special demurrer, only.

8. Where there is any defect, imperfection or omission in any pleading which would be fatal on demurrer, yet if the issue joined is such as to require, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed the judge would direct the jury to give, or the jury would have given, the verdict, such defect, etc., is cured by the verdict.

9. **JUDGMENT**—*surplusage disregarded.* Where a verdict and judgment for a gross sum attempt to distribute the amount among the several plaintiffs, such attempt may be regarded as surplusage, and the defect in form will be cured by the Statute of Amendments.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the City Court of the City of Aurora; the Hon. RUSSELL P. GOODWIN, Judge, presiding.

MESSRS. LITTLE & AVERY, and MESSRS. ALSCHULER & MURPHY, for the plaintiffs in error.

Mr. BENJAMIN F. HERRINGTON, for the defendants in error.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

Sarah Bell, wife, and the other appellees, children of Arthur Bell, deceased, brought this action on the case against appellants, to recover for an "injury to their means of support," in consequence of the intoxication and resulting death of said Arthur Bell.

The substance of the charge against the defendants, as appears from the declaration, is, that Jacob Helmuth, being engaged in the business of selling intoxicating liquors in the village of Yorkville, in Kendall county, this State, on the 16th of May, 1890, sold, gave and furnished Arthur Bell, James Wilcox and Frank Griffin intoxicating liquors, whereby they became intoxicated, and unable to perceive and apprehend

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Opinion of the Court.

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danger, etc., and went upon the Fox river in a certain boat, where, in consequence of being so intoxicated, they were thrown from or fell out of said boat and were drowned. The first and second counts charged the selling to Arthur Bell alone, the third to the three parties jointly, the fourth to Wilcox and Griffin jointly, the fifth to Griffin alone, and the sixth to Wilcox alone. Following the last count is the allegation, that during the time the defendant Jacob Helmuth was engaged in the business of selling intoxicating liquors, as aforesaid, he occupied a building owned by himself and the defendant Albertina Helmuth, (describing the premises,) and then and there gave and furnished the intoxicating liquors that caused the death of Arthur Bell, and the defendant Albertina then and there knowingly permitted the same, and permitted the said premises to be so used, etc. Then follows a statement of the age of the deceased and that of the wife, their marriage, the respective ages of the children, the oldest being seven years and the youngest four months old; that the plaintiffs were all dependent upon the father and husband for their entire support; that they all lived together as one family, and are without any means of support, wherefore they have sustained damages, etc.

To the declaration, and each count thereof, the defendants filed a general demurrer, which being overruled, they pleaded the general issue and went to trial. The jury returned a verdict assessing the plaintiffs' damages at \$5000, which they attempted to apportion among them by giving to the wife \$1500 and to each of the children \$700. The clerk recited in the record that there was a motion by defendants for a new trial, which was overruled, and they excepted. Judgment was entered upon the verdict in favor of all of the plaintiffs for the full amount of the verdict, \$5000, but then proceeds to apportion the amount, as was attempted by the verdict. On error to the Appellate Court the judgment of the circuit court was affirmed, and from that judgment of affirmance this writ of error is prosecuted.

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Opinion of the Court.

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It is assigned for error that the circuit court erred in overruling defendants' demurrer to the declaration, in receiving and entering the verdict of the jury, in denying the motion for a new trial, in rendering judgment upon the verdict, and that the verdict and judgment are irregular, informal, illegal and erroneous. No bill of exceptions whatever appears in the record, and, of course, only such errors as appear upon the face of the record proper can be considered. The only questions, therefore, presented for our decision are, does the declaration sustain the judgment, and is the judgment so defective in substance, upon its face, as to require its reversal. If appellants desired to question the correctness of the rulings of the circuit court on other errors assigned, they should have presented those rulings by proper bill of exceptions.

The declaration is not skillfully drawn, but counsel for appellants, in the objections they urge against it, do not give due consideration to the fact that those objections come after verdict, and to the effect of our Statute of "Amendments and Jeofails." For instance, it is insisted that the declaration is fatally defective because it shows that certain of the plaintiffs were minors, who do not sue by guardian or next friend, whereas the statute expressly provides that no judgment shall be reversed "for the reason that the person in whose favor the verdict or judgment is rendered is an infant, and appeared by attorney." So, the objection that no one count of the declaration sufficiently charges the defendant Albertina, is met by the same statute, in which it is provided that no judgment shall be reversed "for the want of any allegation or averment, on account of which omission a special demurrer could have been maintained." The allegation of ownership in the premises upon which the liquor was sold made Albertina jointly liable with the seller of the intoxicating liquors, by the terms of the statute. The attempt is not, as is assumed, to charge her by a distinct count, but to charge her jointly with the seller, as shown by each of the counts. That allega-

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Opinion of the Court.

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tion may be treated as a part of the whole declaration or as a part of the last count. True, a special demurrer could have been sustained to it, if defendants had seen fit to interpose it, but the defect is cured after plea and verdict.

The position that no joint right of action is given the wife and children by the express terms of the statute, may be conceded. The language, "severally and jointly," as used in section 9 of the Dram-shop act, has been held to apply to defendants, and that seems to be the more natural construction. We do not agree, however, that it must necessarily follow that a joint action by persons injured in their means of support can in no case be maintained. Here it is alleged that the children, all of tender years, and the wife, resided together as one family, and were wholly dependent upon the deceased father and husband for support. It was his duty, under the law, to provide for them, as a family, the necessities of life suitable to their condition, to the extent of his ability. True, they each had a separate right of action for the loss of that support; but it is impossible to say that they did not suffer a joint loss, and we are unable to see why, in such a case, the wife and children may not join in a suit to recover damages for that loss. Certainly no injury can be done the defendant thereby. By the same section of the statute an action is given a parent. If a father and mother living with a son upon whom they are dependent for support, and who is providing for them, are deprived of the same in consequence of the intoxication of the son, it would seem unreasonable to hold that two actions, instead of one, should be brought by the parents. This statute does not, as seems to be supposed, require all actions under it to be brought by parties injured, severally. The words "in his or her own name," may, by the express language of the statute, (chap. 131, sec. 1,) be read in the plural. The injury may be redressed "by any appropriate form of action, in any of the courts of this State having competent jurisdiction," and we can conceive of no good reason why,

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Opinion of the Court.

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where joint interests are affected, a joint action may not be brought.

But if it were otherwise, appellants are in no condition to raise the question now. Each of the parties plaintiff had a right of action against the defendants, of the same nature, growing out of the same wrong, and even though the statute does not authorize a joint suit, the defendants having elected to plead to the action so brought, and suffered a verdict and judgment to go against them, have waived the error. Going to this and each of the foregoing objections is the general rule, that an objection which could have been removed in the trial court if made there, can not be urged for the first time in an appellate court. If the objection had been made in due time, the plaintiffs could have dismissed the suit as to the infant defendants, and proceeded with the action in the name of the wife alone. *Graham et al. v. Fulford*, 73 Ill. 596.

We have carefully examined the declaration, and are satisfied that whatever of defects there are in it are defective statements of a cause of action, and not statements of a defective cause, and can not therefore be taken advantage of on error. The rule as laid down by Chitty, (vol. 1, 711, 712,) quoted with approval in *Keegan et al. v. Kinnare*, 123 Ill. 292, is: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." Tested by this rule, there can be no serious question as to the sufficiency of this declaration to support the judgment below.

As to the objection to the judgment itself, it is only necessary to again call attention to the Statute of Amendments, and cite the cases of *Pierson v. Hendricks*, 88 Ill. 34, and *Guild*

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Syllabus.

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v. *Hall*, 91 id. 223. Other cases to the same effect might be referred to, but the point is so clearly covered by the statute that the citation of decisions is unnecessary. All that part of the entry of judgment in this case which attempts to distribute the amount among the respective plaintiffs can be rejected as surplusage, and still a good judgment remain.

On the whole record the judgment of the Appellate Court is right, and should be affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* Friederich Scheuber

v.

FRED. C. NIBBE *et al.*

*Filed at Ottawa May 8, 1894.*

1. DRAINAGE DISTRICT—*may include a village.* A drainage district organized under the Farm Drainage act may include within its limits a part of the territory of a village already organized under the general law relating to cities and villages.

2. It can not be doubted that the legislature has the power to authorize the organization of municipal corporations for one purpose, embracing territory situated wholly or partly within the boundaries of another municipal corporation already organized for another purpose.

3. Section 11 and subsequent sections of the Farm Drainage act, which provide for the formation of districts for combined drainage out of territory lying within a single town, merely provide that the territory to be embraced in the proposed district shall lie within one town. Those sections are sufficiently broad to embrace any and all contiguous territory within a town which is so circumstanced as to require a combined system of drainage for agricultural or sanitary purposes, irrespective of whether any portion of it is already included within the boundaries of a pre-existing municipal corporation or not.

APPEAL from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

Mr. JACOB J. KERN, State's Attorney, Mr. MILLARD F. RIGGLE, and Mr. WILLIAM ELIOT FURNESS, for the appellants.

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Opinion of the Court.

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Mr. RICHARD PRENDERGAST, and Mr. S. A. REYNOLDS, for the appellees.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a proceeding by *quo warranto*, brought to test the validity of the organization of Drainage District No. one, in the township of Niles, Cook county, claimed to have been organized under the provisions of the Farm Drainage Act. It seems to be conceded that, in the organization of the district, all the statutory requirements were complied with, the only objection to its validity being, that the district includes a portion of the territory of the village of Niles Center, a municipal corporation organized under the general law in relation to the incorporation of cities and villages.

It appears that the district embraces a long, narrow and somewhat irregularly shaped territory, and that at about the middle of the district, a portion of the territory of the village is included, extending entirely across the district. It will thus be seen that, if the portion of the village included in the district were omitted therefrom, the district would be divided into two separate portions, having no connection with each other, and it may perhaps be admitted that if the village territory was improperly and illegally included, the organization of the district must be held to be invalid.

But we are unable to see upon what ground it can be held that the inclusion in a drainage district organized under the Farm Drainage Law of a portion of the territory of a village already organized under the general law in relation to cities and villages is improper or unlawful. It can not be doubted that the Legislature has the power to authorize the organization of municipal corporations for one purpose, embracing territory situated wholly or partly within the boundaries of another municipal corporation already organized for another purpose.



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Opinion of the Court.

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This question was fully considered in *Wilson v. Board of Trustees*, 133 Ill. 443. That case involved the question of the constitutionality of the act entitled, "An Act to create sanitary districts, and to remove obstructions in the Des Plaines and Illinois rivers," approved May 29, 1889, the first section of which provided that, "whenever any area of contiguous territory within the limits of a single county shall contain two or more incorporated cities, towns or villages, and shall be so situated that the maintenance of a common outlet for the drainage thereof will conduce to the preservation of the public health, the same may be incorporated as a sanitary district." One of the questions raised was, whether it was within the power of the General Assembly, under the Constitution, to authorize the formation of sanitary districts, disregarding the existence and boundaries of pre-existing municipal corporations, and invest the corporate authorities with the power of taxation for sanitary purposes. In considering that question, we held, that while the General Assembly may vest in cities, towns and villages, the power to construct sewers, drains, etc., for sanitary purposes, it may also create a corporation within the county, and invest it with like power, and so, may create a corporation including both city and county, and invest it with power to secure the public health by means of sewers, channels and drains; that there are no constitutional restrictions as to the boundary lines of public or municipal corporations within which new corporations may be formed, except as to counties, and that it is wholly unnecessary that the corporate authorities of the new corporation should be also the corporate authorities of some specific pre-existing corporation; that it therefore violates no principle of constitutional law to create a district, and vest it with powers of taxation for sanitary purposes, co-extensive with the territory to be controlled, and that the propriety of the creation of such municipal corporation belongs alone to the General Assembly and not to the courts.

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Opinion of the Court.

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Precisely the same doctrine must be held to apply to the statute under which the drainage district now before us was organized. That was an act "to provide for drainage for agricultural and sanitary purposes," etc., and, upon the same principles laid down in the case above cited, the General Assembly had power, under the constitution, to provide for the organization of drainage districts, embracing such territory as in the exercise of its legislative discretion it thought proper, wholly irrespective of whether the territory to be thus organized into a drainage district, or any part of it, was already embraced within the boundaries of a pre-existing municipal corporation.

We are also of the opinion that the provisions of the Farm Drainage Act can not be so interpreted as to exclude from a drainage district to be organized under them, the territory already embraced within the limits of an incorporated village. Section eleven of the act and subsequent sections which provide for the formation of districts for combined drainage out of territory lying within a single town, merely provides that the territory to be embraced within the proposed district shall lie within one town. 3 Starr & Cur. Stat. 443, *et seq.* The provisions of these sections are sufficiently broad to embrace any and all contiguous territory within a town which is so circumstanced as to require a combined system of drainage for agricultural or sanitary purposes wholly irrespective of whether any portion of it is already included within the boundaries of a pre-existing municipal corporation or not. And we know of no other provision of the statute, and are referred to none, by which any further limitation in this respect is imposed.

By the judgment of the Circuit Court, the petition for a writ of *quo warranto* was dismissed, and we are of the opinion that, upon the facts appearing in the record that judgment was proper, and it will therefore be affirmed.

*Judgment affirmed.*

## Syllabus.

273 LRA 111

## THE VILLAGE OF DWIGHT

v.

JOHN A. HAYES.

*Filed at Ottawa May 8, 1894.*

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1. **NUISANCE**—*pollution of a stream—preventing by injunction.* A court of equity has jurisdiction to prevent the pollution of the water in a stream by emptying the sewage of a city therein, whereby the water will be rendered unwholesome and unfit for use, and a private nuisance will be created in the premises of a land owner over which the stream flows.

2. Where such a nuisance is shown, though causing inconsiderable damage, a court of equity will enjoin its continuance; and in deciding upon the right of a proprietor to an injunction against the creation of such a nuisance, the court will not consider the convenience of the public. The fact that a large population will be affected by the interruption of the use of a system of sewers, is immaterial, where the rights of an individual owner are affected.

3. The fact that the creek into which the sewage of a city is proposed to be emptied by a system of sewers, near the farm of the complainant, is not a running stream during all portions of the year, but during very dry weather contains only small pools or ponds of water standing in the deeper parts of its channel, will only serve to aggravate the nuisance when the complainant's land is situated but a little distance from the proposed point for the discharge of the sewage, and is crossed over by the creek.

4. **SAME**—*enjoining—before the right is established at law.* It is a general rule, formerly strictly enforced, that before a court of equity would interfere to restrain a private nuisance, the complainant must establish his right in a court of law. But this rule has been somewhat relaxed in modern times, and when a case is clear, so as to be free from substantial doubt as to the right to relief, and it is evident that a nuisance *per se* is sought to be created, equitable relief will be granted without first resorting to an action at law.

5. Where the discharge of the sewage of a village into a creek pollutes and corrupts the waters of the stream as it flows across a party's land, and thereby creates a nuisance *per se*, and there is no doubt of such party's rights, he will be entitled to an injunction restraining the creation of the threatened nuisance.

6. **EASEMENT**—*how created—parol license—revocation.* The right of a village to pollute the waters of a creek by discharging sewage into

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Opinion of the Court.

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it, is in the nature of an easement, which can be created only by grant or prescription; and a mere oral consent to such pollution of the stream will vest in the village no right not in the power of the party giving the consent, at any time to revoke. Nor will the fact that the village has expended money or incurred liability on the faith of such parol license, present any obstacle to such revocation.

7. *OFFER OF SETTLEMENT*—*as evidence of amount of claim.* A party whose personal or property rights are threatened with irreparable injury, may offer to accept a specified sum of money as a full compensation for the threatened injury; but such offer, when rejected, will have no tendency, as against the party making it, to show the amount or nature of his damages.

8. The law favors offers of settlement, and will not permit them afterward to be used to the prejudice of the party who makes them. So the offer of a land owner to accept a certain sum for the privilege of emptying a sewer into a stream flowing over his land, and thereby polluting the water, when rejected by the other party, can not be resorted to for the purpose of showing that the damages to such owner and his property, which would result from discharging the sewage of a village into the creek, may be adequately remedied, by a judgment at law.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Livingston county; the Hon. C. R. STARR, Judge, presiding.

MESSRS. MAYO & WIDMER, Mr. GEORGE W. PATTON, and Mr. R. S. McILDUFF, for the appellant.

Messrs. REEVES & BOYS, for the appellee.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, brought by John A. Hayes against the Village of Dwight, to restrain the village from constructing a system of sewers, so that the same will discharge the sewage of the village into Gooseberry creek, a stream of water running through the complainant's land. The complainant owns and resides on a farm, containing about 212 acres, situate in Grundy county, and adjoining the south line of the county. The village of Dwight is an incorporated village, having a population of about 1600, and situated in

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Opinion of the Court.

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Livingston county, and about a mile or a mile and a half south of the south line of Grundy county. 'Gooseberry creek has its head-waters several miles south of Dwight in two separate branches, one of which runs through the village, the two forming a junction about a half mile below on the land of David McWilliams, and running thence in a northerly direction across the complainant's land, which adjoins that of McWilliams on the north, and emptying into Mazon creek.

Gooseberry creek, as the evidence shows, is a stream in which water constantly flows, except during certain portions of the dry weather in summer, and during that time, it contains pools of water at different places along its channel, sufficient in quantity and of sufficient purity to furnish drink for cattle and other domestic animals kept by the owners of the lands through which it flows. The complainant, as it appears, occupies and uses his land as a stock farm, and has been accustomed, for many years, to use the creek for watering his stock, and he has also been accustomed, during the winter season, to take from it his supply of ice for use during the summer.

In the summer of 1892, the village of Dwight commenced the construction of a system of sewers which were to be so constructed as to discharge the sewage of the village into Gooseberry creek at a point on the land of McWilliams, a short distance below the confluence of the two branches of the creek. The complainant thereupon filed his bill to restrain the village from discharging the sewage from its proposed system of sewers into the creek, alleging that there was a constant supply of living water in the creek, sufficiently pure and good for stock; that the complainant was using his farm as a stock farm, and relied upon the waters of the creek for the purposes of watering his stock, and that he cut ice therefrom and stored the same at his residence for the use of his family, and that the discharge of the sewage into the creek would render the water thereof unfit for the domestic uses above referred to, and would also cause noxious odors to spread over the complain-

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Opinion of the Court.

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ant's farm and about his place of residence, thereby rendering the same unhealthful and uncomfortable as a place in which to live, and so, would cause irreparable damage to the complainant's premises and place of residence, and would create a nuisance.

On the filing of the bill, an injunction *pendente lite* was awarded as prayed for, and an answer and replication having been afterwards filed, the cause was heard on pleadings and proofs, and at such hearing a decree was entered by the Circuit Court, dismissing the bill at the complainant's costs for want of equity, but without prejudice to the complainant's right to prosecute an action at law. On appeal by the complainant to the Appellate Court, the decree was reversed and the cause remanded with directions to the Circuit Court to enter a decree in favor of the complainant making the injunction perpetual. From the judgment of reversal, the village of Dwight now appeals to this court.

A large number of witnesses were examined, and the testimony in the record is very voluminous and to a very considerable degree conflicting. Among other things, the opinions of many witnesses were taken as to what would be the probable effects upon the waters of the creek, as they flow across the complainant's land, and upon the surrounding atmosphere, of discharging the sewage of the village into the creek a short distance above his premises. While some of these witnesses seem to be of the opinion that no serious pollution of the water would result, and no nuisance be created, we concur in the opinion of the Appellate Court that the decided preponderance of the evidence sustains the conclusion that the water would thereby become so polluted as to render it unfit for domestic use, or for the drink of domestic animals. And this view is strongly reinforced by the inherent probabilities of the case.

Such being the case, there can be no doubt, as it seems to us, as to the right of the complainant to relief in equity. As

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Opinion of the Court.

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said by Mr. High, in his Treatise on Injunctions, sec. 810: "Frequent ground of application for the preventive aid of equity is found in cases of the pollution of water by the flow of sewage from towns or cities into streams whose waters are thereby injured and rendered unfit for use. In cases of this nature, the preventive jurisdiction of equity is well established, the general doctrine being, that the fouling or pollution of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction. In conformity with this doctrine, the owners of land upon the banks of a river below a city may enjoin the city authorities from polluting the river by sewage."

In Gould on Waters, sec. 546, the rule is laid down as follows: "An authority over sewage is not an authority to commit a nuisance. An owner of land upon a stream below a city is entitled to an injunction against injury by the outflow of sewage. So an injunction will lie to prevent the opening of additional sewers into a stream in such a manner as to render the water unfit for use, and it is not a defense that the city can lawfully enter upon the premises of those who use the sewer for the purpose of abating the nuisance. And if a few householders upon the stream have used it as a drain, a modern board can not found a prescriptive right to corrupt the stream upon such usage. If any nuisance of this kind be shown, though causing inconsiderable damage, equity will enjoin its continuance. In deciding upon the right of a proprietor to an injunction against such a nuisance, the court will not consider the convenience of the public. The fact that a large population will be affected by an interruption of the use of the system of sewers is immaterial, where the rights of an individual are invaded." See also, Wood on Nuisances, sec. 683, *et seq.* See also, *Dierks v. Commissioners of Highways*, 142 Ill. 197.

It is true the creek in question is not a running stream during all portions of the year, but during very dry weather contains only small pools or ponds of water standing in the deeper

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Opinion of the Court.

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places along its channel. But this fact manifestly would only tend to aggravate the nuisance, especially in those places situated, as is the complainant's land, but a little distance from the proposed point for the discharge of the sewage. The necessary result would be, that in the hot and dry weather of summer, the offensive substances discharged from the sewer would accumulate and remain at or near the point of discharge, not only defiling and polluting the pools of water standing in that portion of the channel, but emitting noxious vapors, corrupting and poisoning the atmosphere in that vicinity.

The decree of the Circuit Court dismissing the bill is sought to be sustained on the ground that before the complainant is entitled to an injunction, he must bring his suit at law and have his right determined by a jury. While it is a general rule, and one which was formerly enforced with very considerable strictness, that, before a court of equity will interfere by injunction to restrain a private nuisance, the complainant must establish his right in a court of law, that rule has in modern times been somewhat relaxed. In *Oswald v. Wolf*, 129 Ill. 200, in discussing this branch of equity jurisdiction, we said: "Even this power was formerly exercised very sparingly and only in extreme cases, at least until after the right and question of nuisance had been settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among the authorities, that to entitle a party to equitable relief before resorting to a court of law, his case must be clear, so as to be free from all substantial doubt as to his right to relief."

We are disposed to think that the complainant's case is one which, within the rule as thus laid down, entitles him to an injunction, without having first established his right at law. None of the substantial facts upon which his right rests are controverted. His title to and possession of the land across which the creek in question runs, and the intention of the village to construct its system of sewers and discharge its sewage



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Opinion of the Court.

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into the creek a few rods above his land, are admitted. It is true, some witnesses are produced who express the opinion that the proposed discharge of the sewage of the village into this stream will not have the effect of materially polluting the water in the creek, but in our judgment, little weight is to be given to the testimony of witnesses who attempt to swear contrary to known and established natural laws. That the sewage of a village of 1600 inhabitants discharged into a small stream, will materially pollute the water of the stream and render it unfit for domestic use, for at least a few rods below the point of discharge, is a proposition too plain, and too thoroughly verified by ordinary experience and observation, to admit of reasonable doubt. That such disposition by the village of its sewage will create and constitute a nuisance *per se*, is a proposition too plain for serious question.

The case of *Wahle v. Reinbach*, 76 Ill. 322, was a bill in equity for an injunction to restrain a threatened nuisance, the nuisance consisting of constructing a privy on a lot adjoining that of the complainant, within eight feet of the complainant's dwelling house and cellar, and within twenty feet of the well from which the complainant and his family were supplied with water for drinking, cooking and other domestic purposes. It was urged by the defendant that, before an injunction could issue in a case of that character, it was necessary that it should be previously determined by a jury in a trial at law that a nuisance in fact existed. This contention was overruled, the court citing in support of its judgment, among various other authorities, the following passage from Kerr on Injunctions: "The court will not, in general, interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance." It was accordingly held that a privy so constructed and located as to corrupt the

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Opinion of the Court.

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water of a well used for domestic purposes, or so near the complainant's dwelling house as to annoy him in the proper enjoyment of his property, constituted a nuisance *per se*, and that no preliminary declaration of that fact by a jury was necessary to give a court of equity jurisdiction.

We are satisfied that the same rule should be applied here. The discharge of the sewage of the village into the creek, thereby corrupting the waters of the stream as it flows across the complainant's land, would create a nuisance *per se*, and the complainant was therefore clearly entitled to an injunction restraining the creation of such threatened nuisance.

But it is contended that the complainant gave his consent to the construction of the proposed system of sewers, and to the discharge of the sewage of the village into the creek, and that he thereby estopped himself from any right to the relief now prayed for. The evidence shows that, when the construction of the proposed system of sewers was in contemplation, a public meeting of the citizens of the village of Dwight was called by the municipal authorities, to consider the advisability of constructing the proposed sewers, and that the complainant was one of those who attended the meeting. It also appears that during the meeting, his views were called for, and that he thereupon made a few remarks in which, as is claimed, he expressed his approbation of the enterprise, and his willingness that the sewers should be so constructed as to discharge the sewage into the creek. He testifies, on the other hand, that he at the time supposed that the sewer under consideration was merely a sewer to convey off the sewage from the buildings of the Keeley Institute, and not a general system of sewers for the entire village, and that whatever he may have said had reference solely to that one sewer, and that he did not intend to be understood as consenting to a discharge into the creek of all the sewage of the village, and there are some circumstances corroborative of the complainant's account of the matter.

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Opinion of the Court.

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How far, if at all, the subsequent action of the village authorities was taken in reliance upon what was said by the complainant at this meeting does not appear, but the evidence shows that they subsequently caused plans and specifications of the proposed system of sewers to be prepared at considerable expense, adopted the necessary ordinance providing for its construction, and entered into a contract with certain parties to construct the sewers at a stipulated price. It also appears that the contractors, after the execution of the contract, commenced its performance, by placing on the ground considerable quantities of brick and tile for the sewers. After this was done, the authorities of the village applied to the complainant for a deed granting to them the right to discharge the sewage into the creek but that the complainant refused to give, and it is conceded that he then or thereafter revoked any oral license which he may have given to the village to discharge its sewage in that manner.

The most that can be said of the complainant's consent to the proposed system of sewers, if he in fact gave such consent, is, that it was a mere oral license which was revocable at any time by the licensor. The right to pollute the waters of the creek by discharging the sewage into it was in the nature of an easement, which could be created only by grant or prescription, and a mere oral consent to such pollution of the stream vested in the village no right which it was not in the power of the complainant at any time to recall. Nor did the fact that the village had expended money or incurred liabilities in the matter of constructing the sewers present any obstacle to such revocation. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.* 112 Ill. 384; *Woodward v. Seely*, 11 id. 157; Tiedeman on Real Prop. sec. 653, and cases cited in note.

So far as the village expended money or incurred liabilities in the matter of constructing the proposed sewers, it must be held to have done so with full knowledge of the fact that the complainant had in no way obligated himself to allow the

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Opinion of the Court.

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sewage to be discharged into the creek, by any binding act or instrument, and that he was at liberty at any time to recall the consent which he had orally given. And if under these circumstances, and without seeking to obtain from him any grant of the right of way over his land, or the execution by him of any other binding obligation in the premises, the village authorities saw fit to take steps towards the construction of the sewers, they are hardly in a position to invoke the doctrine of estoppel for the purpose of precluding the complainant from the assertion of his legal or equitable rights in the premises.

It is finally insisted that the complainant has a complete and adequate remedy at law, and that relief in equity should be denied for that reason. We do not understand counsel as denying that ordinarily, in cases of private nuisances of this character, the threatened damage is, in a legal sense, irreparable, so as to call for the interposition of equity, but it is claimed that, because the complainant, at the request of the village authorities, submitted a proposition or offer to permit the discharge of sewage into the creek upon certain specified terms, he thereby conclusively admitted that his damages were capable of admeasurement in money, and therefore capable of being completely compensated at law. The proposition submitted was as follows:

"R. A. BUCK:

"DWIGHT, ILL., 7/28, 1892.

"*Dear Sir*—About the sewer, will say: That I will require the creek made straight by the Grosh house, and cleaned up through the willows below the same, and the creek fenced on both sides, three-board and two-wire fence; two bridges made across the creek; said fence and bridges to be kept in repair by the city without expense to me, and for being deprived of the use of said creek for stock watering, ice cutting, etc., consideration will be five thousand dollars (\$5000). This leaves the stench question open.

J. A. HAYES."

## Syllabus.

This, on being submitted to the village board, was promptly ejected. We are unable to see that any such force or effect can be given to this proposition as is contended for. A party whose personal or property rights are threatened with irreparable injury, may, if he sees fit, offer to accept a specified sum of money as a full compensation for the threatened injury, but such offer, when submitted and rejected, can have no tendency, as against the party making it, to show the amount or nature of his damages. In cases of this character as in others, the law favors offers of settlement, and will not permit them afterwards to be used to the prejudice of the parties who make them. So here, the offer of settlement can not be resorted to for the purpose of showing that the damages to the plaintiff and his property which would result from discharging the sewage of the village into the creek might be adequately remedied by a judgment at law.

We concur with the Appellate Court in its conclusions, and its judgment will be affirmed.

*Judgment affirmed.*

GEORGE J. HERRICK

v.

THOMAS LYNCH *et al.*

*Filed at Ottawa May 8, 1894.*

1. **ATTORNEY**—*taking deed to aid grantor in defrauding creditors.* Where a person conveys all his real estate to his legal adviser, for the purpose of placing it beyond the reach of his creditors as well as to secure a debt due the grantee, and is induced to do so by the advice and artifice of the grantee, a court of equity will treat the deed as a mortgage, and allow a redemption, notwithstanding the fraud attending the transaction, the parties not being *in pari delicto*.

2. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is

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Statement of the case.

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illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices.

3. **CHANCERY**—*jurisdiction—waiver of right to question.* Where a court of equity obtains jurisdiction of the parties and the subject matter, it will not pass upon the accounts of the parties by piecemeal; and when the defendant takes issue in respect of claims of indebtedness against him, and answers on the merits, he will waive all right he may have had to question the jurisdiction of the court.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of DeKalb county; the Hon. CHARLES KELLUM, Judge, presiding.

This is an appeal from a judgment of the Appellate Court, affirming a decree of the circuit court. The facts disclosed by the record are sufficiently stated by the Appellate Court, as follows:

"In the year 1888 Thomas Lynch, Sr., died in DeKalb county, seized of two farms, one in DeKalb county and one in LaSalle county, leaving no widow, but seven children, his only heirs-at-law. His son Thomas Lynch, Jr., was appointed administrator of his estate, and during his administration invested a part of the funds of the estate in the purchase of lot 3 in Mallory's addition to Leland, in LaSalle county, and had a conveyance of the same made to himself and his brother, Charles Lynch. Subsequently a conveyance was obtained from George Lynch, one of the children, of his interest in the real estate of his father, to Thomas and Charles Lynch. A reckoning was had between Thomas and Charles and the other children, and \$2300 was borrowed by Thomas from one Meinke to make good funds which he had appropriated from the personal assets of the estate, and at the same time Charles borrowed from the same party \$700, the other children becoming security for Thomas and Charles. Thomas secured a deed from Charles of his interest in the town lot in Leland, and he and Charles executed to their brothers and sisters a

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Statement of the case.

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mortgage on all of their interest in their lands for the purpose of indemnifying them as surety on the indebtedness to Meinke.

"On the 7th day of August, 1890, one Llewellyn obtained a judgment against Thomas and Charles for \$200. On the 12th of August, 1890, appellant, George J. Herrick, obtained judgment against Thomas and Charles on a note of \$175, upon which Charles was surety. On August 5, 1890, Charles executed and delivered to his brother, James Lynch, a mortgage for \$2000 on all his interests in the real estate. On the 17th and 18th days of December, Thomas executed quitclaim deeds to Herrick of all his interest in the real estate inherited from his father, and the town lot in Leland. In May, 1891, a bill for partition of the farm lands, and for an accounting between the parties interested therein, was filed by all the children except Thomas, making Thomas and appellant parties defendant. The bill charged default upon the part of Thomas in failing to indemnify the complainants as surety upon the Meinke indebtedness, and asked that the rents and profits of lot 3 received by Herrick after his purchase from Thomas be paid over on such indebtedness, and asking a foreclosure of the mortgage given by Thomas to his brothers and sisters on said town lot 3. In June, 1891, an amendment to the bill was filed, setting up the judgments mentioned above, against Charles and Thomas, and the mortgage indebtedness from Charles to James, and alleging that it was about \$1200. Herrick answered, denying the validity of the mortgage from Charles to James, averring that it was given for no consideration, and for the purpose of defrauding the creditors of Charles. Thomas failing to answer, a default was entered against him.

"A decree was entered finding the title in the farm lands as above set forth, finding that Herrick owned an undivided three-fourteenths, subject to the incumbrances, by virtue of his purchase from Thomas, and appointing commissioners to partition the lands. The commissioners reported that the lands

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Statement of the case.

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were not susceptible of partition, and appraised the same at \$13,770. A decree for sale was entered, and in October, 1891, the lands were sold under the decree for \$16,210. A few days before the sale Thomas filed an interpleader, charging that Herrick held title to his interest in the real estate simply as security for the note upon which judgment was entered against him and Charles, that Herrick had collected rents on the lot amounting to \$137, which should be applied upon the note, and that he had offered to pay Herrick the balance due him, and requested a reconveyance, which was refused. The interpleader asks that the master in chancery, out of the proceeds of the sale, may pay what balance may be due Herrick, and that Herrick be required to reconvey lot 3 to him. He subsequently filed an amendment to his bill, in which he claims to have paid other moneys to Herrick. The question of accounting, liens, validity of the mortgage from Charles to James, having been reserved, the case was referred to the master in chancery to take proofs and make findings as to all the matters pertaining thereto, and the controversy between Herrick and Thomas Lynch, it being agreed that Herrick should be considered as denying all the material allegations in the so-called interpleader.

"There was no controversy on the general question of accounting between Thomas Lynch and his brothers and sisters, but the contest was as to the validity of the mortgage from Charles to James, and as to whether the deeds from Thomas to Herrick were given only as security for indebtedness held by Herrick against Thomas and Charles, merely, or were absolute conveyances, and whether Thomas advanced to Herrick the sums of money claimed by his amended interpleader. The master reported adversely to Herrick on all of the controverted questions. Exceptions were filed to his report, and upon a hearing the court overruled the same and rendered a decree approving the master's report, finding that the note and mortgage from Charles to James was valid and security



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Statement of the case.

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for a debt of \$1270, with interest; finding the deeds from Thomas Lynch to Herrick were given as security only for indebtedness, and should be treated as mortgages; that the indebtedness from Thomas Lynch to George J. Herrick had been paid; that Thomas Lynch advanced to George J. Herrick the sum of \$490 over and above the net rents of lot 3; that the rents had over-paid Herrick \$150.78, and ordered that Herrick pay to Lynch the \$150.78. From this decree Herrick appealed."

On entering its judgment of affirmance, the Appellate Court filed the following opinion:

HARKER, P. J.: "The controverted questions in this case are: First, whether the quitclaim deeds executed and delivered to appellant on the 17th and 18th of December, 1890, were given to secure indebtedness to be treated in equity as mortgages, or were absolute conveyances; second, whether, in the event of that question being decided against appellant, relief should not be denied Thomas Lynch, on the ground that the conveyances were made with fraudulent purpose of hindering and delaying creditors; third, whether Thomas Lynch advanced to appellant the sums of money claimed by the amended interpleader, as it is called in this case, and allowed by the master in chancery; fourth, whether the alleged advances to appellant could become the subject of adjudication in a court of equity; fifth, whether the mortgage from Charles Lynch to James Lynch was made in good faith and valid.

"The evidence in this record shows that Thomas Lynch, through mismanagement in the administration of his father's estate, had become largely indebted to the estate, and involved in difficulties with his brothers and sisters. In his embarrassment he applied to appellant, a lawyer without license, for advice and financial aid. Appellant furnished him some money, and undertook, through his advice, to lead him out of his difficulties. We entertain but little doubt that while appellant was thus acting as a legal adviser, various schemes by

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Statement of the case.

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which creditors of Thomas could be defeated of their claims were discussed and considered by the two. We are of the belief that these schemes were suggested by appellant.

"We have carefully examined the testimony, and have reached the conclusion that the master's report and the finding of the court, that the deeds from Thomas Lynch to appellant were given as security for indebtedness, and should be treated as mortgages, were correct. It was a large amount of property to secure so small an indebtedness, and one of the purposes may have been to prevent other creditors from reaching it. We do not think, however, that under the circumstances there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction. The parties were not *in pari delicto*. One was legal adviser, the other client. The advice of the former being adopted, he procured title to the latter's interest in valuable real estate. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices. 1 Story's Eq. Jur. sec. 300; *Baehr v. Wolf et al.* 59 Ill. 474.

"We do not feel warranted in disturbing the finding as to the state of accounts between appellant and Thomas Lynch, and the order that appellant should pay Thomas the sum of \$150.78. There was a sharp conflict between the parties on this branch of the case. The master, who heard the testimony and stated the account, saw the witnesses and observed their manner of testifying. His opportunities for judging correctly their credibility were superior to ours.

"We think the court had jurisdiction to adjudicate upon the matter of advances made by Thomas Lynch to appellant. Having obtained jurisdiction of the parties and the subject matter, there was no necessity of litigating over these accounts

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Opinion of the Court.

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by piecemeal. Having answered to the so-called interpleader, and taken issue upon the claim of this indebtedness, he waived all right, if he had any, to the question of jurisdiction.

"The views above expressed fully dispose of the contention that the mortgage from Charles Lynch to James Lynch was invalid. We may say, however, without entering into detail upon the merits of that question, that the evidence satisfies us that the mortgage was made in good faith."

MESSRS. CARNES & DUNTON, for the appellant.

MESSRS. JONES & ROGERS, and Mr. T. M. CLIFF, for the appellee Thomas Lynch, Jr.

Mr. LUTHER LOWELL, for the appellee James Lynch.

PER CURIAM: Counsel on both sides have filed in this court the same briefs prepared by them for and used in the Appellate Court, and no proposition is raised here which was not presented to and passed upon by that court. All the controverted questions raised are essentially questions of fact, and as to most of them the evidence is to a great extent conflicting. We have examined the record with care, and are of the opinion that the evidence sustains the decree. The opinion of the Appellate Court, as it seems to us, fairly and properly disposes of the points made by counsel, and any further discussion of them by us would therefore be superfluous. We are disposed to adopt the opinion of that court, and for the reasons there stated, the judgment affirming the decree will be affirmed.

*Judgment affirmed.*

## Syllabus.

JOHN L. PETERSON

v.

THE BRABROOK TAILORING COMPANY *et al.**Filed at Ottawa May 8, 1894.*

1. VOLUNTARY ASSIGNMENT—*what constitutes.* A transfer of property, to be treated as a voluntary assignment under the statute, must be a conveyance to an assignee in trust for the creditors. A transfer of property by an insolvent directly to his creditor, for the purpose of securing or providing the means for the payment of that creditor, only, is not a voluntary assignment.

2. SAME—*whether effected by giving judgment notes.* The giving of judgment notes by an insolvent corporation, due on demand, to three of its creditors, followed by the entry of judgments thereon and the levy of executions on all the tangible property of the corporation, will not, of itself, constitute a voluntary assignment, nor is it, in any proper sense, a diversion or misappropriation of a trust fund.

3. INSOLVENT CORPORATION—*preferring creditors.* The mere fact that a corporation may be insolvent does not so far charge its directors and officers with the character and functions of trustees as to take from them the power to make preferential transfers of the corporate assets, so long as they act in good faith, and do not attempt to prefer themselves.

4. SAME—*misapplying funds—effect on innocent creditors.* A corporation being unable to meet its obligations, procured a loan of \$5000 from certain of its creditors to enable it to continue business, and gave them its judgment notes for their debts and such loan, which notes were payable on demand. The creditors, becoming fearful of trouble with other creditors, caused judgments to be entered on their notes, and took out executions, which were levied on all the tangible property of the corporation. The \$5000 loan was afterward paid over to the principal stockholder, to apply on indebtedness to her: *Held*, that the misapplication of the loan could not affect the creditors thus secured, they being in no respect privy to such misapplication.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

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## Briefs of Counsel.

Mr. JAMES A. PETERSON, for the appellant:

The assets of an insolvent corporation are a trust fund for creditors, and it can not prefer its officers when they are creditors. When it ceases to do business it can not prefer creditors. *Railway Co. v. Ham*, 114 U. S. 587; *Melvin v. Insurance Co.* 80 Ill. 446; *Insurance Co. v. Manufacturing Co.* 97 id. 537; *Queenan v. Palmer*, 117 id. 619; *Mining Co. v. Edwards*, 103 id. 472; *Clapp v. Peterson*, 104 id. 27; *Mining Co. v. Mining Co.* 116 id. 170; *Beach v. Miller*, 130 id. 162.

Insolvency is but the condition of inability to meet one's obligations as the same become due, or in the usual course of business or trade. *Atwater v. Bank*, 40 Ill. App. 501; *Wolverton v. Taylor Co.* 30 id. 70.

When a debtor has formed a determination to voluntarily dispose of his whole estate, it is immaterial into how many parts the performance is broken. The law will regard all his acts having such object as one transaction. *White v. Cotzhausen*, 129 U. S. 329; *Preston v. Spaulding*, 120 Ill. 208.

An assignment is a transfer without compulsion, by a debtor to an assignee, in trust, to apply the same to the payment of his debts, and returning the surplus, if any, to the assignor. *Farwell v. Cohen*, 138 Ill. 216; *Farwell v. Nils-son*, 133 id. 45.

Where an insolvent debtor, quitting business, determines to yield dominion of his entire estate to a few creditors, and transfers substantially all his property to a few creditors by way of preferences, such acts will be declared to constitute a voluntary assignment, and such preferences will be set aside as against the statute. *White v. Cotzhausen*, 129 U. S. 329.

Messrs. TENNEY, CHURCH & COFFEEN, for the appellees:

It was competent for the corporation to prefer appellees as creditors and turn its property over to them in payment, if there is no fraud. *Reichwald v. Hotel Co.* 106 Ill. 439; *Warren v. Bank*, 149 id. 9.

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Opinion of the Court.

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Mr. JUSTICE BAILEY delivered the opinion of the Court :

This was a bill in chancery, brought by John L. Peterson against the Brabrook Tailoring Company, its stockholders and officers, and certain of its creditors and others, praying, among other things, that certain judgments by confession against the company be vacated and set aside, and the liens of the executions issued thereon be cancelled, and that the company be wound up, a receiver appointed, and its assets collected and distributed *pro rata* among all its creditors. The suit was brought by the complainant as a stockholder and creditor of the company, and the bill was filed in his own behalf, and in behalf of all other creditors of the company who might choose to become parties and share in the costs and expenses of the litigation.

The Brabrook Tailoring Company was a corporation organized under the laws of this State February 5, 1887, with a capital stock of \$50,000, divided into 500 shares of \$100 each. Of this stock, on the organization of the company, Ida E. Brabrook, wife of William F. Brabrook, became the owner of 489 shares, William F. Brabrook Jr., a son, of five shares, Arthur G. Brabrook, another son, of five shares, and William F. Brabrook, the husband, of one share. Ida E. Brabrook was elected president, Arthur G. Brabrook vice president, and William F. Brabrook Jr. secretary and treasurer, and the three constituted the board of directors, and held their respective offices until December 13, 1890, the date of the company's failure.

The judgments by confession, which are the principal subjects of litigation, were all entered December 13, 1890, and consisted of one judgment in favor of William B. Roe for \$8878.42, one in favor of Hinkleman, Jackson & Co., for \$6440.08, and one in favor of Kinzie & Callinan for \$2795.23. These were all entered on promissory notes and warrants of attorney executed that day, the notes being drawn payable

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Opinion of the Court.

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on demand, and the papers being executed by the secretary of the company in pursuance of a resolution of the board of directors adopted the same day authorizing their execution. On these judgments writs of execution were immediately issued and levied on the property of the company.

The original bill contained various charges against the stockholders and officers of the company of fraud in connection with its organization and the disposition of its property, and it also charged that the three notes, warrants of attorney and judgments were each the result of a fraudulent conspiracy between these creditors and William F. Brabrook and William F. Brabrook Jr., "to ruin and destroy the business of the company, lay waste its property, and defraud its stockholders and creditors." It appears that on the same day on which the notes and warrants of attorney were given, the company, as further security to these creditors for their debts, assigned to them its outstanding book accounts, and the bill charged that such assignment was the result of a similar fraudulent conspiracy.

On filing the bill, an order was entered appointing a receiver, but on appeal to the Appellate Court from such order, it was held that the bill was not sufficient on its face to authorize the appointment of a receiver, and the order was accordingly reversed. *Brabrook Tailoring Co. v. Belden Bros. & Co.* 40 Ill. App. 326.

A demurrer to the bill being sustained, the bill was amended so as to allege, among other things, that at the date of the judgment notes and the entry of the judgments, the Brabrook Tailoring Company was and for a long time prior thereto had been insolvent, and that such fact was then and for a long time prior thereto had been known to the judgment creditors; that the property of the defendant corporation levied upon was a trust fund for the benefit of all its creditors, and should be distributed *pro rata* among them; that by the executions the judgment creditors had obtained an undue and unlawful

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Opinion of the Court.

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preference over other creditors, and that their liens therefore should be set aside; and the amended bill prayed that the property of the Brabrook Tailoring Company be declared a trust fund, and distributed *pro rata* among all the creditors.

The bill was duly answered, and the cause being heard on pleadings and proofs, a decree was entered dismissing the bill for want of equity at the complainants' costs. On appeal to the Appellate Court the decree was affirmed, and the present appeal is from the judgment of affirmance.

The first contention by counsel for the appellant is, that the execution of the judgment notes was an illegal preference, and that the judgments entered thereon should be set aside at the instance of the other creditors, and the assets of the corporation distributed *pro rata* among all. This contention must rest either upon the theory that the execution of the judgment notes constituted in law a voluntary assignment under the statute, and that the preference thus given was void under section thirteen, or that it constituted a diversion and misappropriation of a trust fund which, by the insolvency of the corporation, had become vested in the corporate officers, as trustees for all the creditors.

As to whether these judgment notes constituted a voluntary assignment, it is sufficient to say that, as has been repeatedly decided by this court, a transfer of property, to be treated as a voluntary assignment under the statute, must be a conveyance to an assignee in trust for the creditors, and that a conveyance or transfer of property by an insolvent directly to his creditor for the purpose of securing or providing the means for the payment of that creditor only, is not a voluntary assignment. *Weber v. Mick*, 131 Ill. 530; *Farwell v. Nilsson*, 133 id. 45. In the first of these cases the preference was given by the insolvent debtor by executing a chattel mortgage upon his entire stock of goods directly to his creditors, and in the second case it was given, as here, by the execution to certain creditors of judgment notes under which levies were



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Opinion of the Court.

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made upon all his assets. It follows that the giving of the judgment notes in this case, followed by an entry of judgments thereon and the levy of executions on all the tangible property of the insolvent corporation, did not of themselves constitute a voluntary assignment.

Nor are we able to see that the execution of the judgment notes and the subsequent entry of the judgments and levy of the executions were, in any proper sense, a diversion or misappropriation of a trust fund. It is true that the estate of an insolvent corporation is said to be a trust fund for the use of the corporate creditors, but it is not the rule in this State that the mere fact of insolvency so far charges the directors and officers of the corporation with the character and functions of trustees as to take from them the power to make preferential transfers of the corporate assets, so long as they act in good faith, and do not attempt to prefer themselves. *Ragland v. McFall*, 137 Ill. 81; *Reichwald v. Commercial Hotel Co.* 106 id. 439; *Warren v. First Nat. Bank*, 149 Ill. 9.

None of the creditors to which the judgment notes were given were stockholders, officers or agents of the corporation, and no want of good faith is shown with which they at least are in any degree chargeable. The bill, it is true, charges fraudulent conspiracies between them and the officers of the company, but we fail to find such charges sustained by the proof. Without attempting to review the evidence, it is sufficient to say that, instead of proving them, it conclusively establishes their falsity.

Nor is it shown, as counsel for the complainant insists, that the officers or agents of the corporation acted as the agents of these creditors and in that capacity obtained for them their preferences. It appears that those of them who were non-residents of Chicago received telegrams from an officer or agent of the corporation summoning them to Chicago, and that, upon their arrival, negotiations were entered into between the officers of the corporation and these creditors, which re-

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Opinion of the Court.

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sulted in their advancing to the corporation the sum of \$5000 in cash, the several creditors contributing to that sum in the *pro rata* proportion of their then existing claims against the corporation, and that the judgment notes in question were thereupon executed to them for the amounts then owing them respectively, including the contribution of each to the \$5000 loan. At that time, as the evidence tends to show, the corporation was a going concern, and its officers expected and hoped that with the aid of the loan thus obtained, they would be able to surmount their existing financial embarrassments and continue in business. Upon the receipt of the judgment notes these creditors employed counsel of their own, and subsequently, on the same day, as appears, in consequence of some intimation received by counsel as to the probable action of other creditors, they advised the immediate entry of judgments and issue of executions, which was done. But the evidence fails to show that, beyond the execution and delivery of the judgment notes, the officers or agents of the corporation had any agency in the entry of the judgments or the levying of the executions.

Even if it be true, as is alleged, that the larger portion of the \$5000 advanced by these creditors was afterwards in fact paid over to the principal stockholder of the corporation to apply on its indebtedness to her, such fact can in no degree affect the rights of these creditors. There is no evidence that such use of the money was contemplated by the creditors at the time they made the loan, or that they were in any respect privy to its subsequent misapplication.

The conclusion to which we have arrived renders it unnecessary for us to notice various other propositions urged by counsel in their briefs. We are of the opinion that, for the reasons above stated, the Circuit Court properly entered its decree dismissing the bill for want of equity, and the judgment of the Appellate Court affirming that decree will be affirmed.

*Judgment affirmed.*

## Syllabus.

## WILLIAM BROMLEY

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Filed at Ottawa May 8, 1894.*

1. **CRIMINAL LAW—BURGLARY—defined.** Burglary, at the common law, is where a person breaks and enters any dwelling house by night, with intent to commit a felony therein, whether such felonious intent be executed or not. But under our statute burglary may be committed by day as well as by night.

2. **SAME—sufficiency of indictment for burglary.** Under section 408 of the Criminal Code, and section 36 of the same code, as amended in 1885, it is unnecessary to charge in an indictment that the crime was committed either "in the night time" or "in the day time," in order to constitute a charge of burglary under the existing law of this State. An indictment which fails to allege that the crime was committed either by day or by night, would clearly be a good charge of burglary committed in the day time.

3. Where a burglary is not alleged to have been committed in the night time, it would seem that only the punishment provided for burglary in the least aggravated degree can be imposed.

4. **SAME—degrees in punishment.** Under our statute, burglary committed in the day time, or in respect to a building not a dwelling house, is punishable by imprisonment for not less than one nor more than twenty years. If, however, the offense is committed in the night time, and in respect to a dwelling house, then the minimum punishment is five years; and if the burglary of a dwelling house is in the night time, and the burglar has a deadly weapon, a deadly drug or an anæsthetic upon his person or in his possession, then not only is the minimum imprisonment five years, but there is no limit to the maximum term of imprisonment.

5. **SAME—proof of burglary as charged.** Where the time laid in an indictment is material, then it must be specifically proved as set out in the indictment. And it is also a general rule that all descriptive averments in an indictment must be proved as laid. So a charge of burglary in the night time is not sustained by proof of a burglary committed in the day time, and it is error to admit in evidence proof of a burglary in the day time.

6. **CRIMINAL LAW—variance—when averments must be proved as charged.** Where allegations are made, if they be such as to enter substantially into the description of the crime, so that they can not be

150 297  
58a 315150 297  
165 624150 297  
76a 597150 297  
89a \*281

150 297

206 \*227

206 \*227

e206 \*420

e206 \*421

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150 297

209 \*445

111a \*829

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115a \*535

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Opinion of the Court.

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severed from it without rendering the description applicable to another and different offense, (different in fact, if not in nature,) then each allegation must be proved, or the indictment is not sustained.

7. *NEW TRIAL—waiver of statement of reasons in writing.* Where a motion for a new trial is submitted without any statement in writing of the grounds therefor, without objection, such statement will be treated as waived, and the want of it can not be urged in an appellate court.

8. *SAME—overruling motion—preserving exceptions.* It is sufficient if the bill of exceptions shows a motion for a new trial was made and overruled, and an exception taken. In such case, the court to which the record is taken on appeal or writ of error can consider the propriety of refusing the motion for a new trial.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

MESSRS. STIRLEN & KING, for the plaintiff in error.

MR. M. T. MOLONEY, Attorney General, Mr. T. J. SCOFIELD, and Mr. M. L. NEWELL, for the People.

MR. CHIEF JUSTICE BAKER delivered the opinion of the Court:

The indictment upon which William Bromley, plaintiff in error, was convicted in the Criminal Court of Cook county, and sentenced to imprisonment in the penitentiary for the term of one year, contained three counts,—two for burglary in the night time, and one for receiving stolen goods. The jury found him guilty of burglary, the verdict making no reference to the count for receiving stolen goods.

It is objected, by defendant in error, to the consideration of the errors assigned in this court, that the record does not show that a sufficient motion for a new trial was made in the trial court. It is said: "No reasons are shown upon which the motion was founded, and taking the bill of exceptions most strongly against the party preparing it, it is fair to presume there were none." And further said: "The bill of exceptions must disclose all the reasons, if any, for the motion, the ruling of the court upon them, and timely exceptions taken." The

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Opinion of the Court.

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bill of exceptions in the record contains the following statements: "And thereupon the jury retired to consider their verdict, and upon the return of the same into court the defendant moved that the same be set aside and a new trial granted, which motion the court afterwards, and on the first day of November, 1893, overruled, and thereupon rendered judgment upon the verdict of the jury, and passed sentence upon the defendant, to which action of the court in overruling said motion for a new trial, in entering said judgment and in passing said sentence, the defendant thereupon excepted."

The objection to the consideration of the errors assigned is not well taken. In *Ottawa, Oswego and Fox River Valley Railroad Co. v. McMath*, 91 Ill. 104, it was held that where a motion for a new trial is submitted, without any statement in writing of the grounds therefor, without objection, such statement will be treated as waived, and the want of it can not be urged in the Appellate Court, and that it is sufficient if the bill shows a motion for a new trial was made and overruled and an exception taken, and that in such case the court to which the record is taken on appeal or writ of error can consider the propriety of refusing the motion for a new trial. This decision has been followed in subsequent cases.

The principal ground that seems to be relied upon by plaintiff in error for a reversal of the judgment is that of variance. One count of the indictment charges burglary, without force, in the night time, of a dwelling house; another charges burglary, with force, in the night time, of a dwelling house; and the other, as we have seen, is for receiving stolen goods. The proof is uncontradicted and conclusive that the burglary of the dwelling house was committed by some one on the 22d day of July, 1893, between the hours of two o'clock and five o'clock in the afternoon, and in the day time.

Burglary, at the common law, is where a person breaks and enters any dwelling house by night, with intent to commit a felony therein, whether such felonious intent be executed or

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Opinion of the Court.

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not. Under our statute burglary may be committed by day as well as by night. Section 36 of the Criminal Code, as amended June 19, 1885, reads as follows: "Whoever, willfully and maliciously and forcibly, breaks and enters, or willfully and maliciously, without force, (the doors or windows being open,) enters into any dwelling house \* \* \* or other building with intent to commit murder, robbery, rape, mayhem, or other felony, or larceny, shall be deemed guilty of burglary, and be imprisoned in the penitentiary for a term not less than one year nor more than twenty years: *Provided, however,* that whoever willfully and maliciously and forcibly breaks and enters, or willfully and maliciously, without force, (the doors or windows being open,) enters into any dwelling house in the night time, with intent to commit murder, robbery, rape, mayhem, or other felony, or larceny, shall, on conviction, be imprisoned in the penitentiary for a term of not less than five years nor more than twenty years: *Provided, further,* that if, at the time of committing the offense mentioned in the proviso, such person shall be found with any deadly weapon, deadly drug or anæsthetic upon his person or in his possession, he shall, on conviction, be punished by imprisonment in the penitentiary for any term of years not less than five." Laws 1885, p. 73; 3 Starr & Curtis' Ann. Stat. 343.

Section 408 of the Criminal Code provides that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. It would seem that under this section, and the statute of 1885 above quoted, it is unnecessary to charge that the crime was committed either "in the night time" or "in the day time," in order to constitute a charge of burglary under the existing law of this State. We think an indictment which fails to allege that the crime was committed either by day or by night would clearly be a good charge of burglary

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Opinion of the Court.

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committed in the day time. In *People v. Barnhart*, 59 Cal. 381, it was held that an information which charges the commission of the crime of burglary, without stating whether the act was committed in the night time or in the day time, embraces both degrees of the crime, and that under such an information it is competent for the jury to find the defendant guilty of the crime in either degree. For reasons hereafter stated, we doubt whether, upon correct rules of criminal pleading, a defendant, upon such a charge, could properly be convicted, under a statute such as ours, of a burglary committed in the night time, but think that a conviction for burglary committed in the day time could be sustained. In *Summers v. State*, 9 Texas App. 396, and in *Bravo v. State*, 20 id. 188, it was held that an indictment for burglary which failed to charge that it was effected in the night time should be considered as charging a daylight burglary. In Michigan the statutes distinguish between the degrees of punishment for simple and for aggravated burglary, and in *Harris v. People*, 44 Mich. 305, it was held that if all the incidents warranting the severer penalties are not alleged in the information, then the smaller punishment only can be inflicted.

It is said in 1 Bishop on Criminal Procedure, sec. 84: "In all cases, without one exception, the common law requires each and every individual thing which itself or a statute has made an element in the wrong upon which the punishment is based, to be alleged in the indictment. Under our statute a burglary committed in the day time, or in respect to a building not a dwelling house, constitutes the offense of burglary, and is punishable by imprisonment for not less than one nor more than twenty years. If, however, the offense is committed in the night time, and in respect to a dwelling house, then the minimum punishment is five years. And if the burglary of a dwelling house is in the night time, and the burglar has a deadly weapon, a deadly drug or an anæsthetic upon his person or in his possession, then not only is the minimum

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Opinion of the Court.

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imprisonment five years, but there is no limit to the maximum term of imprisonment. Applying to the case of a burglary not alleged in the indictment to have been committed in the night time, the rule above quoted from Bishop, and that which seems to be the doctrine of *Harris v. People, supra, Summers v. State, supra*, and *Bravo v. State, supra*, it would seem that only the punishment provided for burglary in the least aggravated degree can be imposed.

It is, however, urged, that the indictment in this case affirmatively charges that the crime was committed "in the night time," while the proof shows that it was committed in the day time; that this constitutes a fatal variance between the proofs and the allegations, and that it was error in the trial court to refuse to exclude the evidence from the jury, and error to overrule the motion for a new trial. When allegations are made, if they be such as to enter substantially into the description of the crime, so that they can not be severed from it without rendering the description applicable to another and different offense, (different in fact, if not in nature,) then such allegation must be proved, or the indictment is not sustained. (*People v. White*, 24 Wend. 520, 570.) Where the time laid in an indictment is material, then it must be specifically proved as set out in the indictment. (10 Am. and Eng. Ency. of Law, p. 562, and authorities cited in note 1.) It is also a general rule that all descriptive averments in an indictment must be proved as laid. Here, the averment that the offense was committed in the night time is not impertinent or foreign, but enters substantially into the description of the crime charged, and is material, as affecting the minimum of the punishment that could be imposed. The prosecution having charged that the burglary was committed in the night time, was required to prove it. This was expressly decided in *Guynes v. State*, 25 Texas App. 584. There the conviction was for burglary, the indictment charging a burglary in the night time. The court instructed the jury that they might convict



## Syllabus.

the evidence showed that the burglary was committed either the day time or in the night time. It was held that this was error, and that under the indictment a conviction could only be had for a burglary committed in the night time. See, also, *Waters v. State*, 53 Ga. 567.

In the case at bar we think it was error to refuse to exclude the evidence from the jury, and to overrule the motion for a new trial. The judgment is reversed and the cause remanded.

*Judgment reversed.*

JAMES ELSON *et al.*

v.

JOHN COMSTOCK.

150	303
181	399

150	803
207	522

*Filed at Ottawa May 8, 1894.*

1. DEDICATION—*by person not the owner.* In 1854 the husband of the owner of land made a plat thereof into blocks and lots, as an addition to a city, which plat showed a block without numbers, which was not divided into lots as were the other blocks, and upon the face of which were the words "Public Square," and the plat was recorded: *Held*, that there was no effectual dedication of the square by reason of the execution and recording of the plat.

2. A dedication of property for public use is in the nature of a conveyance for the purposes of the use, but a person can convey or donate more or greater estate than he holds. If he has no title, or his title is conditional, and it fails, the dedication also will fail.

3. SAME—*vesting title in the village—rights of lot owners.* Whatever right the public may have to the use of a block marked in the plat of addition as a public square, will, on the incorporation of the village in which it lies, vest in such village, as the representative of the public; and whatever easements or privileges the purchasers of lots in the addition are entitled to claim in such square as appurtenant to their lots, must be regarded as belonging to them as a part of the village so incorporated.

4. TRESPASS QUARE CLAUSUM FREGIT—*plea of liberum tenementum—judgment conclusive of title.* It has been held that if, in an action of trespass quare clausum fregit, the defense pleaded is *liberum tenementum*, judgment for the plaintiff is conclusive upon the defendant.

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Statement of the case.

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when he afterward attempts to set up title, subject to the qualification that the close described in the second action is the same as that described in the first.

5. Other decisions hold, that while the judgment in such case will not be regarded as conclusive, yet it may be shown by parol evidence, or otherwise, that the question of title was actually tried and passed upon in the action of trespass. Such a judgment is necessarily conclusive as to what appears from the record or is shown by parol to have been involved in the issues made by the pleadings in the suit, and to have actually come in question on the trial.

6. In an action of trespass *quare clausum fregit*, brought in respect to a block of land in a village, the defendant pleaded title in the village, and that the block had been previously dedicated to the public for a public square; that such dedication had been accepted by the public, and that the village was simply possessing itself of the block for its own benefit: *Held*, that a judgment for the defendant upon such issues must be regarded as *res judicata* so far as the right of the village to possess and use the block as and for a public square was concerned, and also conclusive upon lot owners in the village to the rights they might otherwise have to such use of the block, because their rights were dependent upon those of the village.

7. *SAME—gist of the action.* While the action of trespass *quare clausum fregit* does not necessarily involve the title or seizin, yet the gist of the action is the injury to the possession. Hence, the judgment in such action will ordinarily be conclusive upon the right of possession.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. THOMAS M. SHAW, Judge, presiding.

This is a bill filed by plaintiffs in error against the defendant in error to enjoin the latter from interfering with the possession of, or title to, a block of ground, alleged to be a "public square," and to declare a deed of the same executed to, and held by, defendant in error, to be null and void. A demurrer was filed to the bill, the demurrer was sustained, and the bill was dismissed. The case is brought here by writ of error.

The facts alleged in the bill are substantially as hereinafter set forth. On March 1, 1854, one Mary McGinnity, since deceased, was seized in fee of 80 acres in Richwoods township in Peoria County, upon which she then was, and for a long time had been, living with her husband, Hugh W. McGinnity.

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Statement of the case.

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On that day, Hugh W. McGinnity made a plat of said premises, or of a part thereof, and wrote upon the face thereof the words: "Plat of McGinnity's Addition to the City of Peoria," and recorded the same. The plat shows, that the property was laid off into streets and alleys and blocks, and that all the blocks, except one, were divided into lots, but that in the center of the plat is one entire block, not subdivided into lots, upon the face of which are the words: "Public Square," and drawings of trees. A copy of the plat is attached to the bill, and it is therein alleged, that such plat "has been recognized by the general public as a valid plat, and that innumerable conveyances have been made with reference thereto." On May 20, 1856, Mary McGinnity obtained a divorce from Hugh W. McGinnity for his fault. Thereafter, while sole she accepted conveyances to herself of certain of said lots which had been previously conveyed away, such conveyances designating the property therein described as being in McGinnity's Addition to the City of Peoria; and she made conveyances of property embraced in said plat, designating such property as being "In McGinnity's Addition to the City of Peoria." Her grantees therein at once recorded their deeds, and took possession thereunder, and have since continued such possession. On July 29, 1856, she conveyed by warranty deed to Frederick Wurst, father of plaintiffs in error, lots 1, 2 and 3 in block 13 in McGinnity's Addition, the conveyance describing the property with reference to the plat of said Addition as recorded; and said Wurst recorded his deed, and went into possession thereunder, and remained in possession until 1864, when he died intestate leaving his children and heirs at law the plaintiff in error, Frederick Wurst, then six years old, and the plaintiff in error, David Wurst, then three years old, and their sister, who still own and are in possession of said lots as tenants in common. It is alleged in the bill, that the "devotion of said block for the purpose of a 'Public Square' as indicated upon said plat is a valuable easement to all of the

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Statement of the case.

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property embraced in said McGinnity's Addition," and that, when said Wurst made his purchase, and for many years thereafter, said block was unoccupied, and was used and enjoyed by the complainants and by the public as and for a "public square."

On February 28, 1870, Mary McGinnity, then Mary Zotz, conveyed by quit-claim deed to the defendant, John Comstock, said block describing it therein as follows: "All of a certain parcel of land in Peoria County, Illinois, described as follows: being the block not numbered, situated in McGinnity's Addition to the City of Peoria, as laid off by said McGinnity on, etc., bounded on the east by Atlantic street, on the north by President, on the west by Central, on the south by Kansas streets in said Addition." It is alleged, that said public square is the only block in said Addition which is not numbered; that it is surrounded by said streets which are the only streets of those names in said Addition; that said Comstock has no other title to said premises than that acquired by said quit-claim deed; that he then went into exclusive possession of said Square and fenced the same, and remained in possession until 1891 when he was dispossessed for a time as hereafter stated, but was again in the exclusive possession thereof, claiming it as his private property, and threatening to appropriate it to his private use and deprive the public of all enjoyment thereof; that, when he obtained his deed, he knew the land was intended for a public square, and that said Wurst purchased his lots in the belief that said land would be used for a public square, and for that reason; that, until 1888, said block was never taxed being marked upon the assessor's books, "Public Square, Not Taxable;" and that said Comstock never paid any taxes upon said block until 1888, when he procured the same to be assessed by the township assessor.

The remaining allegations of the bill are as follows: "And that in the year 1883 the village of North Peoria was organized under the general law, embracing within its territorial

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Statement of the case.

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limits all of said McGinnity's addition and other lands, and that said village has continued to exist, and exercise the functions of a village, from the time of its organization hitherto; and that in 1891 said village removed all of said fences, and said Comstock brought an action of trespass against said village and the officers, charging them with trespassing upon his close, in which suit defendants pleaded, among other things, that said tract of ground had previously been dedicated to the public as and for a public square, and that the public had accepted it as such, and that defendants, by authority of said village, had committed the supposed trespasses; and defendants pleaded other pleas, alleging title in said village to said premises, and that said defendants were simply possessing themselves of the property of said village for its benefit and under its directions; and afterwards the court pronounced judgment in said case in favor of plaintiff, which judgment remains in full force, and is a final and conclusive adjudication against the claim of the village of North Peoria for possession of said square; and that it was the duty of said village to sue for the possession of said square, and that after the organization of said village no right of action existed in favor of complainants herein, or in favor of any other private individuals, for the trespasses and wrongs of the defendant, Comstock, herein complained of, until after it was judicially determined that the said village could not maintain an action against said Comstock, and that during the time the right of action for said wrongs was in said village exclusively, complainants herein were guilty of no *laches*, and the running of the Statute of Limitations as against them was suspended, and the said Comstock could not, by his possession of said square during such period, acquire any title or strengthen any claim thereto against orators."

Mr. ARTHUR KEITHLEY, for the plaintiffs in error.

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Opinion of the Court.

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MESSRS. STEVENS & HORTON, and MESSRS. JACK & TICHENOR,  
for the defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

Hugh W. McGinnity was not the owner of the premises when he executed and recorded the plat. The fee was then in his wife, Mary McGinnity. Whatever interest in the land he may have had as the husband of his wife ceased when the divorce was granted for his fault. (1 Starr & Cur. page 904, sec. 14; *Rendleman v. Rendleman*, 118 Ill. 257). It follows, that there was no effectual dedication of the square by reason of the execution and recording of the plat. "A dedication of property for public use is in the nature of a conveyance for the purposes of the use; but a person can convey or donate no more or greater title than he holds. If he has no title, or his title is conditional, and it fails, the dedication fails." (*Gridley v. Hopkins*, 84 Ill. 528).

Here, it appears from the plat, attached to the bill, that the lots of plaintiffs in error do not front upon the block claimed to be a public square, but upon a street at some distance from the block, and not running by it; nor does the bill allege that any of the lots conveyed to and by Mrs. McGinnity fronted upon the block in question. Whether or not Mrs. McGinnity and her grantee are estopped from denying, that the block was dedicated to the public as a "public square" because of her alleged recognition of the plat by receiving and making conveyances with reference to the plan therein indicated, is a question which does not properly arise in this case in view of the allegations of the bill in regard to the judgment in the trespass suit.

The rights of the public, if it had any, to the use of the block as a "public square" prior to 1883 became vested in the village of North Peoria when it was organized in that year. From that time the incorporated village was the representative of the public; and whatever easements or privileges the pur-

## Opinion of the Court.

chasers of lots in the Addition were entitled to claim in the "square," as appurtenant to their lots, must be regarded "as belonging to them as a part of the" village thus incorporated. (*Zearing v. Raber*, 74 Ill. 413; *Maywood Co. v. Village of Maywood*, 118 id. 61). In 1891 the village attempted to assert its claim to the block in question by removing therefrom the fences of the defendant in error, Comstock, who had taken possession of the block in 1870 under a quit-claim deed from Mrs. McGinnity, and had remained in possession for more than twenty years. Defendant in error "was dispossessed for a time" by these acts of the village, but at once brought an action of trespass *quare clausum fregit* against the village and its officers. The bill alleges that the trial of this action resulted in a judgment in favor of the defendant in error, and against the village, and that the judgment still remains in full force, and "is a final and conclusive adjudication against the claim of the village of North Peoria for possession of said square."

It has been held, that, if, in an action of trespass *quare clausum fregit*, the defense pleaded is *liberum tenementum*, judgment for the plaintiff is conclusive upon the defendant when he afterwards attempts to set up title, subject to the qualification that the close described in the second action is the same as that described in the first. Other decisions hold that, while the judgment in such case will not be regarded as conclusive, yet it may be shown by parol testimony or otherwise, that the question of title was actually tried and passed upon in the action of trespass. (*Dunkle v. Wiles*, 5 Denio, 296; *Moran v. Mansur*, 63 N. H. 377; *Parker v. Leggett*, 13 Rich. (S. C.) 171; *Campbell v. Cross*, 39 Ind. 155; *White v. Chase*, 128 Mass. 158; *McKnight v. Bell*, 135 Pa. St. 358; *Stapleton v. Dee*, 132 Mass. 279; Wells on Res Adjudicata and Stare Decisis, sec. 315; 21 Am. & Eng. Ency. of Law, 244; *Dean v. Comstock*, 32 Ill. 173.) Such a judgment is necessarily conclusive as to what appears from the record, or is

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Opinion of the Court.

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shown by parol, to have been involved in the issues made by the pleadings in the suit, and to have actually come in question on the trial. (*Dunkle v. Wiles, supra*; 21 Am. & Eng. Enc. of Law, 185.) While the action of trespass *quare clausum fregit* does not necessarily involve the title or seizin, yet the gist of the action is the injury to the possession. (*Dean v. Comstock, supra*; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177; 2 Greenl. on Ev. 613.) Hence, the judgment in such action will ordinarily be conclusive upon the right of possession. (*White v. Chase, supra*; 2 Greenl. on Ev. secs. 625, 626; 2 Hilliard on Torts, page 11; *Lee v. Town of Mound Station*, 118 Ill. 304.)

In the case at bar, the bill states specifically what defences were pleaded by the village in the action of trespass. The pleas therein filed alleged title in the village; that the block in question had been previously dedicated to the public as and for a public square; that such dedication had been accepted by the public; and that the village was simply possessing itself of the block for its own benefit. The issues made by the pleas were decided adversely to the village. The questions of title, and of the right of possession, and of dedication and acceptance, appear to have been passed upon, and determined in favor of the defendant in error. There is nothing to show, that the judgment rendered in the trespass suit upon the issues thus stated has ever been reversed, and, as long as it stands, it must be regarded as *res judicata*, so far as the rights of the village to possess and use the block as and for a public square are concerned. The judgment is also conclusive upon any rights, which the plaintiffs in error might otherwise have to such use of the block, because their rights are dependent upon those of the village, and can only be derived and held through the village, as the representative of the public.

The decree of the Circuit Court is affirmed.

*Decree affirmed.*



## Syllabus.

JAMES I. McCAULEY *et al.*

v.

ALBERT L. COE *et al.**Filed at Ottawa May 8, 1894.*150 311  
91a 4504

1. **MORTGAGE**—*of leasehold interest.* A mere term of years may be mortgaged, and the lien thereby created will be co-extensive with the term, and become extinguished by mere lapse of time whenever the term ends.

2. **SAME**—*right of mortgagee in an option of mortgagor to purchase.* A lessee, under a lease to him of one year, had an option to purchase the demised premises, and during the term gave a deed of trust on his interest in the same. The lessee and the party secured by the trust deed did not elect to purchase during the term, and failed to exercise the option before the retraction of the same by the lessor: *Held*, that the trust deed became inoperative as a security, and was a cloud on the title of the lessor and his grantee.

3. **SAME**—*removing, as a cloud upon the title.* Before a deed of trust given by a lessee can be declared a mere cloud upon the title of the lessor or his grantee, and removed as such, no fraud, accident or mistake being alleged, it must appear either that the deed was originally invalid, and ineffectual to convey to or vest in the trustee or his beneficiary any interest, either legal or equitable, in the property, or that by reason of some subsequent event such interest has terminated and ceased to exist, so as to render the deed no longer a valid security upon any interest or equity in the property. But if either of these facts appears, the deed of trust is only an apparent, but not a real, incumbrance, and should be removed from the title of the lessor or his grantee.

4. **SAME**—*mortgagee's title—no better than mortgagor's.* While the trustee in a deed of trust, and his beneficiary, acquire a lien upon the legal and equitable rights held by the grantor at the time the deed was executed, they will take no rights superior to those of their grantor. The equities to which their lien attaches are subject, in their hands, to the same contingencies, and are liable to extinguishment in the same manner, they would have been if they had remained unincumbered in the hands of the mortgagor.

5. **SAME**—*surrender of title by lessee—effect on his mortgage.* Where the holder of a lease giving an option to purchase land mortgages his interest in the premises, his subsequent surrender and conveyance of all rights remaining in him; to the lessor, will in no manner affect the rights of the mortgagee.

## Brief for the Appellants.

6. **OPTION CONTRACT—lease with option to purchase.** A lease of land for one year contained an agreement that upon payment in full of the rent reserved, and the execution of notes and a deed of trust for \$1600, in addition to the rents, the lessor would convey the property to the lessee, but imposed no obligation on the latter to purchase: *Held*, that the option thus given was more than a mere offer on the part of the lessor, which he was at liberty to withdraw at any time before acceptance.

7. **SAME—consideration.** In such case, the contract embodied in the lease is an entire one, and the same consideration which supports the other provisions of the lease will apply to the option therein given to purchase during the term; and, the lease being under seal, a consideration sufficient to support all its provisions will be presumed.

8. **SAME—right of lessor to retract the option.** A binding contract for an option for a given time prevents any retraction of the offer during that time. When an option is based upon a sufficient consideration, and is in the nature of a contract, it is only when the period of its continuance is definite that the right to retract is suspended.

9. **SAME—withdrawal of option—notice.** After the time for electing to purchase under an option has passed, a conveyance by the party giving the option, and his subdividing the property, with other adjoining land owned by him, before acceptance of the offer, being acts inconsistent with the option, are sufficient evidence of a retraction of the offer. So, too, the filing of a bill by him to set aside a deed of trust given by the holder of the contract giving the option, is an act of the same character.

10. **SAME—withdrawal of the option—not a forfeiture.** The withdrawal of an unaccepted offer to sell land, or the retracting of an option which the other party has not seen fit to exercise, involves none of the elements of a forfeiture. It deprives no party of any right and abrogates no contract, but is merely the exercise of the right by a party to recede from a proposition which the other party has not seen fit to accept.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

Mr. E. W. ADKINSON, for the appellants:

The proposition contained in the lease constituted but a continuing offer to sell, and could be merged into a contract only by an acceptance, and compliance with its terms. *Haven v. Wakefield*, 39 Ill. 509; *Sutherland v. Parkins*, 75 id. 338;

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Brief for the Appellees. Opinion of the Court.

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*Larmon v. Jordan*, 56 id. 204; *Corcoran v. White*, 117 id. 118; *Harding v. Gibbs*, 125 id. 85; *Willard v. Tayloe*, 75 U. S. 567.

Even though the stipulation in the case could be construed as an agreement to sell, there was a forfeiture and termination thereof. *Chrisman v. Miller*, 21 Ill. 227; *Murray v. Schlosser*, 44 id. 14; *O'Neal v. Baptist Church*, 48 id. 349; *Anderson v. McCarty*, 61 id. 64.

MESSRS. THORNTON & CHANCELLOR, for the appellees:

One having a contract to purchase real estate has such an interest as may be mortgaged. *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Curtis v. Root*, 20 id. 518; *Hagen v. Brainard*, 44 Vt. 294.

A lease with privilege of purchase constitutes a mortgageable interest. *Bank v. Baumeister*, 87 Ky. 6.

Where there is a plain intention for a contract of sale, the law will construe a lease containing a provision for sale to be a contract. *Lucas v. Campbell*, 88 Ill. 447; *Murch v. Wright*, 46 id. 487.

MR. JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, to remove a cloud upon the title to real estate. The facts are these: In 1885, Daniel Stauffer was the owner of the property in question, and, as a result of certain negotiations between him and George W. Butler, he built a dwelling house thereon, and after its completion, executed and delivered to Butler an instrument in writing in the form of a lease, bearing date October 29, 1885, by which he demised and leased the premises to Butler for the term of one year, commencing November 1, 1885, and ending November 1, 1886. The instrument was in the usual printed form of leases then in use in Chicago, and contained the various covenants and provisions ordinarily inserted in instruments of that character.

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Opinion of the Court.

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Among other things, it contained the usual provision authorizing the lessor to declare the term ended for non-payment of rent, and to re-enter and expel the lessee, and also a covenant on the part of the lessee to surrender and deliver up the demised premises to the lessor immediately on the determination of the lease, either by non-payment of rent or otherwise, and that if he should remain in possession of the same after default in the payment of rent, or after the determination of the lease in any of the ways therein provided, he should be deemed guilty of a forcible detainer of the premises under the statute and subject to eviction and removal forcibly or otherwise, with or without process of law, the lessee waiving his right to notice of the lessor's election to declare the term at an end under any of the provisions of the lease, or to a demand for the payment of rent or for possession of the premises, but stipulating that the simple fact of the non-payment of rent should constitute a forcible detainer of the premises.

The clause reserving rent was as follows: "And the said party of the second part, in consideration of the leasing of the premises aforesaid, by the said party of the first part to the said party of the second part, does covenant and agree with said party of the first part, his heirs, executors, administrators and assigns, to pay the said party of the first part, as rent for said premises, the sum of \$500, in manner following: \$100 cash on the execution of this instrument, the receipt of which is hereby acknowledged; \$100 January 1, 1886, and \$300 on or before November 1, 1886, with interest at seven per cent from date, and cost of insurance." Immediately after the foregoing clause was the following: "It is further agreed, on full payment of said sums, and the further sum of \$1600, with seven per cent interest from this date, in manner following: One note for \$500 due on or before November 1, 1887, and two notes for \$550 each due respectively November 1, 1888 and 1889, all bearing interest at seven per cent, payable to the order of Daniel Stauffer, and secured by trust deed on the

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Opinion of the Court.

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above premises, the said first party will convey to second party the above premises by warranty deed, and subject to the taxes and assessments of 1885 and subsequent years." The instrument made no provision for a forfeiture in case of the non-payment of the \$1600 above mentioned, nor was any language used expressly making time of the essence of the contract.

Butler paid the first installment of rent and entered into possession of the premises under the lease. He also paid the second installment of \$100 at the time of its maturity. On the 16th day of August, 1886, and while so in possession, Butler and wife, and one Albert B. Paine and wife, joined in the execution of a deed of trust, conveying to Albert L. Coe, as trustee, the premises described in the lease, such conveyance being made to secure the payment of a promissory note for \$400, executed by Butler and Paine, bearing even date with the deed of trust, and payable to the order of Sarah Curtis three years after date, with interest at the rate of seven per cent per annum. This deed of trust was placed on record the next day after its date.

Butler made no further payments under the lease, and being, as it seems, unable to make the purchase on the terms therein provided for, he, his wife joining him therein, executed to Stauffer a quit-claim deed of the premises, bearing date November 3, 1886, and at the same time surrendered to Stauffer the possession thereof. The quit-claim deed contained the following recital: "This conveyance being made to release interest in said lots under and by virtue of a clause giving the right of purchase, in the lease bearing date October 29, 1885, between the parties aforesaid, the said Butler being unable to perform the conditions of said clause on his part to be performed."

It appears from Stauffer's testimony, which is not contradicted, that he took possession of the premises upon their being surrendered to him by Butler, and that on December 31,

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Opinion of the Court.

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1886, he sold and conveyed them to Mary Keating; that he afterwards bought them back and made a re-subdivision thereof in connection with other adjoining lands which he then owned.

On the 22d day of April, 1890, Stauffer filed the original bill in this case, praying to have the deed of trust to Coe declared to be a cloud upon his title and removed as such. While the bill was pending, he sold and conveyed the premises to James I. McCauley and Thomas Swartwout, and they thereupon appeared and filed their supplementary bill, alleging the conveyance of the premises to them, and setting up substantially the same facts and praying for the same relief as in the original bill. Answers and replications were filed, and the cause being heard on pleadings and proofs, a decree was rendered dismissing the bill at the cost of the complainants for want of equity. On appeal by them to the Appellate Court, the decree was affirmed. Although the amount involved is less than \$1000, the complainants have appealed to this court from the judgment of affirmance, the judges of that court having granted the necessary certificate of importance.

Before the deed of trust to Coe can be declared a mere cloud upon the title of the complainants and removed as such, no fraud, accident or mistake being alleged, it must appear, either that the deed was originally invalid and ineffectual to convey to or vest in the trustee or his beneficiary, any interest, either legal or equitable, in the property, or, that by reason of some subsequent event, such interest has terminated and ceased to exist, so as to render the deed no longer a valid security upon any interest or equity in the property. But if either of these facts appear, the deed of trust is only an apparent but not a real incumbrance upon the complainants' property, and should not be permitted to remain as a cloud upon their title.

There can be no question, we think, that Butler, at the time he executed the deed of trust, had an interest in the premises

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Opinion of the Court.

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which was capable of being conveyed by way of mortgage. We are disposed to concur with the Appellate Court in the view that the instrument under which he was then in possession was, in substance and legal effect a lease for the term of one year, only a portion of the term having then elapsed. No doubt a mere term for years may be mortgaged, and the lien thus created will be co-extensive with the term, and become extinguished by mere lapse of time whenever the term ends. So far then as the deed of trust is to be treated as a lien upon the term, it ceased to encumber the property on November 1, 1886, the day the term ended.

But coupled with the contract of leasing was the further agreement that, upon payment in full of the several sums reserved as rent, and the execution of notes and a deed of trust for \$1600 in addition thereto, the lessor would convey the property to the lessee. Whatever difficulty there may be in the case relates to the interpretation and effect to be given to this clause of the instrument. It seems clear that the clause did not amount to a contract of sale, since it imposed no obligation on the lessee to purchase. The instrument contained a covenant on his part to pay the sums reserved as rent, but whether he should consummate the purchase by executing the notes and deed of trust was left wholly to his option. What right or interest then, either legal or equitable, became vested in the lessee by this option to purchase?

We are inclined to the view that the option thus given was more than a mere offer on the part of the lessor which he was at liberty to withdraw at any time before acceptance. It was an option or privilege based upon a valuable and sufficient consideration. The contract embodied in the lease was an entire one, and the same consideration which supported its other provisions applied as well to this. Besides, the lease being under seal, a consideration sufficient to support all its provisions will be presumed. The option seems to have been one which the lessee had at least until November 1, 1886, to

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Opinion of the Court.

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accept, and the power of the lessor to withdraw it prior to that date may well be questioned on the ground supported by many of the authorities, that a binding contract for an option for a given time, prevents any retraction of the offer during that time. Tiedeman on Sales, sec. 41, and authorities cited in note.

But even assuming the law to be as just stated, the option can not be regarded as binding on the lessor for an indefinite period after the termination of the lease. Even where an option is based upon a sufficient consideration and is in the nature of a contract, it is only where the period of its continuance is definite, that the right to retract is suspended. The only definite period mentioned in the lease is the term of one year covered by the demise, and after the termination of that period without an acceptance, even if the option itself did not then expire, it continued from that time subject to be retracted at any time by the lessor.

While it is true that the trustee in the deed of trust and his beneficiary acquired a lien upon the legal and equitable rights held by the lessee at the time the deed was executed, they acquired no rights superior to those of the lessee. The equities to which their lien attached were subject in their hands to the same contingencies and were liable to extinguishment in the same manner that they would have been if they had remained unincumbered in the hands of the lessee. It is not pretended that either they or the lessee, up to the time of filing the original bill in this case, which was nearly three and one-half years after the termination of the lease, either accepted the offer of sale contained in the lease, or did any act evidencing an intention to accept it. The lessee, having released and surrendered to his lessor all right remaining in him to exercise the option by the execution of the quit-claim deed, of course could not thereafter accept. But such transaction between him and his lessor could not affect the rights of the



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Opinion of the Court.

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mortgagees one way or the other. They, as the assignees of such equities as were based upon the option, were bound to take the same steps to mature and perfect their rights as their assignor would have been compelled to take if no assignment had been made. Even if their long delay in electing to exercise the right of purchase, for which no excuse is given, is not of itself sufficient to extinguish their right, it is clear that during all that period the lessor had the right, as against them, to retract his offer of sale, and any act on his part evidencing an intention to retract, if such is shown, had the effect of extinguishing the equities of the mortgagees.

We think the sale and conveyance of the demised property by the lessor to Mary Keating, made about two months after the expiration of the lease, was an act of that character. *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463. The same thing may be said of his re-subdivision of the property in connection with other adjoining property owned by him after his repurchase from Mary Keating. These were acts inconsistent with the continuance of the offer, and evidenced an intention to retract it. It may also be said that the institution of this suit by the lessor to remove the deed of trust as a cloud upon his title before any acceptance of the offer is an act of the same character.

We do not think that any question of declaring a forfeiture is involved in the case as seems to have been supposed by both the Superior and Appellate Courts. The withdrawal of an unaccepted offer, or the retracting of an option which the other party has not seen fit to exercise, involves none of the elements of a forfeiture. It deprives no party of any right and abrogates no contract, but is merely the exercise by a party of the right to recede from a proposition which the other party has not seen fit to accept.

Nor are we able to see any force in the contention made by counsel that the position of the defendants is in some way

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Opinion of the Court.

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benefited by the fact that immediately upon the expiration of the term of the demise, the lessor procured from the lessee a surrender and quit-claim of all remaining rights vested in him by the lease, and particularly by the clause giving an option to purchase. The rights of the mortgagees, whatever they were, were already vested in them, and could be in no way affected by any subsequent conveyance or release by their mortgagor. Nor are we able to see that the relations of the mortgagees to the lessor were in any respect different after the latter had purchased in the rights outstanding in the lessee than they were before. The case, so far as we can see, furnishes no room for the doctrine of merger in such way as to affect the rights or equities of the mortgagees, either beneficially or otherwise.

We are of the opinion that all rights, both legal and equitable, conveyed by the deed of trust, have terminated and ceased to exist. The estate for years has expired by lapse of time, and the equities based upon the option to purchase upon which the trustee and his beneficiary acquired a lien, were extinguished prior to the commencement of this suit, by the failure to elect to exercise the option, and the retracting of the option by the lessor. The deed of trust therefore had ceased to be operative as a security, but remains a mere cloud upon the title of the complainants.

The judgment of the Appellate Court, and the decree of the Superior court will both be reversed, and the cause will be remanded to the latter court with directions to enter a decree in accordance with the prayer of the bill.

*Judgment reversed.*

## Syllabus.

WILLIAM PARTLOW, Admr.

v.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

*Filed at Springfield April 2, 1894.*

1. RAILROADS—*speed of trains—right to regulate.* In the absence of any ordinance of a village regulating the speed of trains through its corporate limits, a railway company will have the right to run its trains through such village at any speed it may think proper, consistent with the safety of its trains and passengers, and of persons rightfully upon its right of way at road crossings, who are exercising ordinary care in crossing the railroad. Any person without ordinary care crossing a railroad, and receiving an injury by reason of the want of such care, can not recover therefor.

2. Under the rules of the common law, a railroad company is required to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on the highways crossing its railroad tracks; and in establishing the rate of speed that trains may be run, due regard must be had not only to the safety of passengers, but also to the safety of all persons, in the exercise of ordinary care, traveling on the highways over and across the railroad tracks.

3. So long as the increased speed of trains adds nothing to the damage and risks of passengers and the traveling public on highways, no one can reasonably complain; and, subject to this limitation, railroad companies may fix such rate of speed for the running of passenger trains as they may think best.

4. SAME—*speed of trains—directions of the president of a village.* On the trial of an action against a railroad company, brought to recover for a personal injury resulting from negligence, the president of the village wherein the accident occurred was called as a witness by the plaintiff, and asked if he had ever directed the marshal to notify the railroad company about fast running in the town, which the court refused to admit: *Held*, that the evidence was properly excluded.

5. SAME—*speed of train through town—as evidence of negligence.* A person was killed at a highway crossing over a railroad in a town, and in an action against the railway company to recover damages for the killing, the court, at the request of the defendant, instructed the jury "that in the absence of any proof of a village ordinance, such a rate of speed as is customary among railroad companies with their fast trains is not, of itself, negligence on the part of the railroad company:" *Held*, that the instruction did not lay down a correct rule, but under the circumstances of this case the error was harmless.

150	321
74a	361
150	321
80a	681
150	321
179	80
150	321
182	273
150	321
89a	7845
150	321
190	7494
150	321
108a	1204
150	321
106a	7489
150	321
112a	154

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Opinion of the Court.

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6. Whether the speed of a train is negligence or not does not depend upon any custom or usage that may be established by railroad companies, nor upon the speed that may or may not be customary among such companies. In the absence of a statute or ordinance a railway company has the right to establish the speed of its trains.

7. *NEGLIGENCE—failure to look for a train at a railroad crossing.* The fact that a person, in attempting to cross a railroad track at a highway crossing, fails to look and listen to see if any train is coming on the track, are facts proper for the jury to consider in determining whether such person has been negligent; but it can not be said, as a matter of law, that the failure to observe such acts is negligence.

8. *SAME—when negligence of plaintiff is immaterial.* Where the jury, in response to special interrogatories, find that the railroad company was guilty of no negligence or want of care which contributed to the accident, it is immaterial whether the person injured was guilty of negligence in failing to look and listen for the train.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Coles county; the Hon. E. P. VAIL, Judge, presiding.

Mr. JAMES W. CRAIG, for the plaintiff in error.

Mr. HORACE S. CLARK, for the defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by William Partlow, administrator of the estate of William F. Partlow, deceased, against the Illinois Central Railroad Company, to recover damages resulting from the death of William F. Partlow, a son of the plaintiff, which occurred at a railroad crossing in the village of Humboldt, by a collision of a wagon and team of horses with a passenger train of the railroad company. On a trial of the cause in the circuit court the jury found the defendant not guilty. The court rendered judgment on the verdict, and that judgment was affirmed in the Appellate Court.

It appears from the evidence that the village of Humboldt contains about three hundred inhabitants. The railroad runs north and south through the village, and the highway upon

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Opinion of the Court.

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which the deceased was driving runs east and west. A short time before seven o'clock in the evening on the 12th day of November, 1891, the vestibule passenger train of the Illinois Central Railroad Company was running through the village of Humboldt at a speed of from forty to fifty miles an hour. Some of the witnesses place the speed at forty miles an hour, some at forty-five miles, and some at fifty. This train was known as a fast train, and made no stop at Humboldt. On the evening in question the deceased was riding in a two-horse wagon, with one Hushong, his brother-in-law. They were approaching the crossing from the west, while the train was coming from the north. Hushong was driving. The horses were both blind. The witnesses all agree that as the train approached the village, and at the crossing, a quarter of a mile north of where the collision occurred, the whistle was sounded, and there is also evidence that the bell was ringing and the whistle was sounded as the train came to the crossing where the accident happened. The deceased and Hushong did not, however, discover the train until they reached the crossing. Whether the team was on the track when the collision occurred, or whether it was driven against the engine as the train approached, is left in doubt from the evidence. The horses, wagon and the two parties were, however, all found after the accident on the west side of the track, which would seem to indicate that the team was driven against the engine.

The court instructed the jury to make special findings, and under the instructions the jury found that the deceased was not exercising reasonable care for his own safety at the time he was killed; that the whistle was sounded at least eighty rods before reaching the crossing where the accident occurred; that the bell was rung and the whistle sounded from a distance of eighty rods from the crossing at which the accident occurred, and kept ringing until such crossing was reached; that if the deceased had listened before the approach of said

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Opinion of the Court.

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train he could have heard it in time to have avoided the accident. To the seventh interrogatory the jury answered as follows: "What negligence or want of care, if any, was there on the part of the employes of the railroad company, contributing to the accident?" Answer, "From the evidence, none." The eighth was: "Had the train been running at a less speed, would the accident have occurred?" And the ninth: "If the train had been running at a greater speed, would the accident have occurred?" to both of which the jury answered that they could not tell. The jury also found: "If the deceased had listened before the approach of the train he could have heard it in time to have avoided the accident; that he did not listen to ascertain if there was a train approaching."

On the trial the president of the village was called as a witness, and he was asked if he had ever directed the marshal to notify the railroad company about the fast running of the train through the town. The evidence was objected to, and the court held that it was not admissible, and this ruling is relied upon as error. The town of Humboldt, if incorporated, had the right to regulate the speed of trains in the incorporated limits of the town by ordinance, but until the town had taken action by ordinance the president had no authority, through the marshal or otherwise, to regulate or control the action of the railroad company, and any direction he may have given the marshal, or any notice the marshal may have given the railroad company, could have no bearing on the case.

Objection is made to the following instruction given in behalf of the defendant:

"In the absence of any proof of an ordinance limiting the speed of a railroad train through a city or village, the railroad company would have a right to run its trains through any such village or city at any rate of speed it thought proper, consistent with the safety of its train and passengers, and of persons rightfully upon its right of way at road crossings, who

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Opinion of the Court.

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exercising ordinary care in crossing the railroad. And a person without ordinary care crossing such railroad, and giving any injury for the want of such care, could not recover therefor on account of such speed alone."

We perceive no substantial objection to this instruction. The village had passed no ordinance on the subject, and in the absence of all instruction on the part of the municipality, by ordinance, the railroad company might properly determine for itself the rate of speed, consistent with the safety of its trains and passengers, and those who had occasion to cross the railroad track in traveling on the highway. As to the last part of the instruction, the rule is so well settled that a person can not recover for an injury unless in the exercise of ordinary care, that it will not be necessary to cite cases in its support.

It is also claimed in the argument that the court erred in giving the following instruction:

"The court further instructs the jury, that in the absence of proof of a village ordinance, such a rate of speed as is customary among railroad companies with their fast trains is in itself, negligence on the part of the railroad company."

We do not think this instruction lays down a correct rule. Whether the speed of a train is negligence or not does not depend upon any custom or usage that may be established by railroad companies, nor upon the speed that may or may not be customary among railroad companies. In the absence of statute or ordinance a railroad company has the undoubted right to establish the speed of its trains; but, under the rules of the common law, a railroad company is required to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on the highways crossing railroad tracks, and in establishing the rate of speed that their trains may be run, due regard must be had not only to the safety of passengers, but also to the safety of all persons, in the exercise of ordinary care, traveling on the highways over and

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Opinion of the Court.

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across railroad tracks. (*Chicago and Northwestern Railroad Co. v. Dunlevy*, 129 Ill. 151.) So long as the increased speed of trains adds nothing to the dangers and risks of passengers and the traveling public on highways, no one can reasonably complain, and, subject to this limitation, railroad companies may fix such rate of speed for the running of passenger trains as they may think best. (*Indianapolis, Bloomington and Western Railroad Co. v. Hall*, 106 Ill. 375.) But while we do not regard the instruction as announcing a correct rule of law, we are unable to perceive in what manner the jury could be misled by it, and if the instruction did not mislead the jury the plaintiff could not be injured, and if not injured the error was harmless, and could not work a reversal of the judgment. There was no evidence before the jury to establish what rate of speed was customary on fast trains among railroad companies, and hence there was nothing in the case upon which the instruction could operate or to which it could be applied by the jury.

It is also claimed that the following instruction, given for defendant, is erroneous :

"Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of neglect unless he approaches it as if it were dangerous ; and if the jury believe, from the evidence, that the deceased, as he approached the railroad track in the wagon driven by his brother-in-law, did not look or listen to ascertain if a train was coming, and observe all reasonable precaution to avoid danger, but, on the contrary, the team was driven directly onto the track where the accident happened, without any steps being taken by the deceased or his brother-in-law to ascertain if a train was approaching, then the deceased was chargeable with such negligence as precludes a recovery in the case, unless the jury believe, from the evidence, that the servants of the railway company upon such occasion were guilty of gross negligence."



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Opinion of the Court.

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It has often been said by this and other courts, that it is the duty of a person approaching a railroad crossing to look and listen before attempting to cross, and that a person failing to observe that precaution is guilty of negligence; but where the statement has been made, the court, as a general rule, was discussing a question of fact, and in such cases the statement may be regarded as accurate. But the court can not say, as a matter of law, that the failure to look and listen is negligence. These facts are proper for the consideration of the jury in determining whether a person has been negligent, but it can not be said, as a matter of law, that the failure to observe such acts is negligence. (*Chicago and Northwestern Railway Co. v. Dunlevy*, 129 Ill. 135; *Terre Haute and Indianapolis Railroad Co. v. Voelker*, id. 542; *Chicago, Milwaukee and St. Paul Railway Co. v. Wilson*, 133 id. 60.) But while the instruction may be inaccurate, as indicated, it could not injure the plaintiff. Upon looking into the record it will be seen that the jury, in their special verdict, found that the railroad company was guilty of no negligence or want of care which contributed to the accident. Under this finding it was immaterial whether the deceased was guilty of negligence in failing to look or listen, because in no event could the plaintiff recover if the railroad company was not guilty of negligence or the want of ordinary care. The error in the instruction being one that did no injury, can not be relied upon as a ground of reversal.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## Syllabus.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY CO.

v.

CHARLES H. BADDELEY, Admr.

*Filed at Springfield April 2, 1894.*

1. **NEGLIGENCE—causing death—evidence supporting a recovery.** In an action by an administrator against a railroad company to recover damages from alleged negligence resulting in the death of plaintiff's intestate, it must appear, from the evidence, that the defendant was guilty of negligence as charged in the declaration, and that the deceased was in the exercise of ordinary care at the time, to entitle the plaintiff to recover.

2. **SAME—contributory negligence—question of fact.** Whether the attempt of the plaintiff's intestate to cross a railroad track at a street intersection while an engine was approaching was negligent, depends upon the circumstances shown by the evidence, such as, the apparent distance from her of the approaching engine, the speed at which it seemed to be running, and her right to rely upon the probability that its speed would not exceed that allowed by ordinance. These are all facts, or matters of law and fact combined, and the question whether she was guilty of contributory negligence is, therefore, a question for the jury.

3. **SAME—comparative—ordinary care of person injured.** If, since the more recent decisions of this court, the doctrine of comparative negligence can be said to have any further place in our system of jurisprudence, it is very clear that no plaintiff can recover upon the ground of mere negligence, who was not himself, at the time of the injury complained of, in the exercise of ordinary care.

4. **SAME—causing death—action by surviving husband—measure of damages.** In an action by an administrator against a railway company to recover compensation for the death of his intestate, the court instructed the jury, that if they found for the plaintiff they should assess his damages at what they believe, from the evidence, to be a proper pecuniary compensation for damages to her surviving husband and next of kin, etc. The statute gives the action in favor of the husband as well as the wife.

5. **INSTRUCTIONS—assuming defendant's negligence—error cured by other instructions.** On the trial of an action against a railway company for causing the death of the plaintiff's intestate, the court instructed the jury, at the plaintiff's request, that if they believed, from the evidence, that the deceased was exercising ordinary care for her own safety, "and came to her death by reason of the negligent act of the

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59a	678
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63a	236
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68a	292
150	328
69a	189
70a	679
150	328
f188	*492
92a	*551
150	328
f189	*616
93a	*415
150	328
94a	*180
150	328
104	*555
150	328
197	*624
150	328
206	*555

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 Brief for the Appellant.
 

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defendant as charged in the plaintiff's declaration," then the jury could find the defendant guilty: *Held*, that the instruction, if construed strictly, and without reference to other instructions given, was noxious to the objection that it assumed the fact that the defendant was negligent as charged, and submitted to the jury the mere question whether the deceased came to her death by means thereof. But such defect was cured by other instructions.

**PRACTICE**—*directing what the verdict shall be.* Where there is evidence tending to show a plaintiff's right to recover, or to justify, as well as require, a submission of the case to the jury, a request of the defendant that the jury be peremptorily instructed to find a verdict for the defendant should be refused.

**APPEAL** from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Mr. G. W. GERE, and Mr. JOHN T. DYE, for the appellant:

Plaintiff's intestate, in making the unsuccessful attempt to pass in front of the locomotive engine, which she saw and knew was coming, when she could have remained at the side of the track with perfect safety, was guilty of such contributory negligence that a recovery against appellant can not be sustained. *Railroad Co. v. Jones*, 76 Ill. 311; *Railroad Co. v. Smiley*, 58 id. 300; *Railway Co. v. Riley*, 47 id. 514; *Railroad Co. v. Jacobs*, 63 id. 178; *Abend v. Railway Co.* 111 id. 2; *Railroad Co. v. Gretzner*, 46 id. 75; *Scofield v. Railroad Co.* 114 U. S. 615; *Railroad Co. v. Houston*, 95 id. 697; *Railroad Co. v. Aiken*, 41 Am. & Eng. Ry. Cases, 572; *Keeley v. Railroad Co.* 13 id. 638; *State v. Railroad Co.* 19 id. 314; *Railroad Co. v. Sunderland*, 2 Ill. App. 307.

Under the laws of this State the husband is not a beneficiary in this class of cases, he not being next of kin of his wife. *Starr & Curtis*, p. 1290, sec. 2; *Dickens v. Railroad Co.* 23 N. Y. 158; *Drake v. Gilmore*, 52 id. 389; *Townsend v. Radford*, 44 Ill. 446; *Gauch v. Insurance Co.* 88 id. 251; *Haraden Larrabee*, 113 Mass. 431; *Railroad Co. v. Minn*, 42 Ga. 1; *Lorett v. Railroad Co.* 55 id. 143.

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Brief for the Appellee.

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The first instruction given for the plaintiff is erroneous in this, that it assumes the defendant was guilty of negligence. *Railroad Co. v. Zang*, 10 Bradw. 597.

The second instruction given for the plaintiff below is erroneous in this, that it fails to state that appellee's intestate, in order to entitle the plaintiff below to recover, should have exercised due and ordinary care, but left the jury to determine the case upon the simple comparison of the negligence of the plaintiff's intestate and the railway company, without regard to the fact that appellee would not be entitled to recover if his intestate had been guilty of such negligence as materially contributed to the injury. *Railroad Co. v. Cline*, 135 Ill. 48.

The third instruction given for the plaintiff is erroneous in this, that it singles out one particular fact in the case and calls the jury's special attention to it. *Hoge v. People*, 117 Ill. 36.

The court erred in giving the fourth instruction for plaintiff below in this, that by that instruction the damages were based upon the pecuniary compensation to the surviving husband as well as next of kin, and because the measure of damages in this class of cases is stated inaccurately. *Chicago v. Scholten*, 75 Ill. 470; *Holton v. Daly*, 106 id. 131; *Rolling Mill Co. v. Morrissey*, 111 id. 650; *Railroad Co. v. Sykes*, 96 id. 173.

**Messrs. KERRICK, LUCAS & SPENCER, for the appellee:**

As a general proposition, a person about to cross a railroad track should stop and look and listen, to see if there is danger in crossing. It is true as a question of fact, yet it can not be so declared as a rule of law. *Pennsylvania Co. v. Frana*, 112 Ill. 405; *Bridge Co. v. Miller*, 138 id. 475; *Railroad Co. v. Adler*, 129 id. 340; *Railroad Co. v. Hutchinson*, 120 id. 596.

The second point in appellant's brief is, that under the laws of Illinois the husband is not a beneficiary in this class of cases. This court held differently in *Chicago v. Major*, 18 Ill. 349.

Appellee's testimony tended to show that the locomotive was running from twenty-five to one hundred miles per hour.

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Opinion of the Court.

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testimony was offered in behalf of appellant. Then we have the further circumstance, which is undisputed, that after the locomotive struck Mrs. Humphrey it went more than a quarter of a mile—nearly a third of a mile—before it could be stopped. So we say, there is no possible room for question as to what defendant below was guilty of negligence, and the running of its train at such a high rate of speed over that permitted by the ordinance, was, of itself, gross negligence. *Railroad Co. v. Gregory*, 58 Ill. 226; *Railroad Co. v. Becker*, 63 id. 483; *Railroad Co. v. Deacon*, 63 id. 91; *Railroad Co. v. Enks*, 91 id. 412; *Railroad Co. v. Engle*, 84 id. 397; *Karl's Railroad Co.* 55 Mo. 476.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was an action on the case, brought by Charles H. Baddeley, administrator of the estate of Emily Humphrey, deceased, against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company to recover damages for the death of the plaintiff's intestate, caused, as alleged, by the negligence of the defendant. The deceased was struck and killed by one of the defendant's locomotive engines, August 27, 1892, at the crossing of the defendant's railway over a public street of the city of Leroy, McLean county. The negligence charged in the declaration consists of recklessly, wantonly, carelessly and improperly driving and managing the engine, and also in running it at a rate of speed greatly exceeding that permitted by an ordinance of the city. The defendant pleaded not guilty, and at the trial the jury found the defendant guilty, and assessed the plaintiff's damages at \$4000. From that judgment the plaintiff remitted \$1500, and judgment was thereupon ordered in favor of the plaintiff for \$2500 and costs. That judgment has been affirmed by the Appellate Court on appeal, and the present appeal is from the judgment of affirmance. At the trial the defendant offered no evidence, but rested its case upon that introduced on the part of the plaintiff, and

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Opinion of the Court.

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it then insisted, as it insisted in the Appellate Court and now insists, that the evidence is insufficient to sustain a recovery.

It appears that the city of Leroy is a municipal corporation organized under the general law, having a population of about 1600, and that among its ordinances in force at the time the deceased was killed, was one which prohibited the running of any engine upon any railroad within the limits of the city, at a greater rate of speed than fifteen miles an hour for passenger trains, and six miles an hour for freight trains. The defendant's line of railway passes through the city from the south-east to the north-west, and at the intersection of Center street, which runs east and west, with Buck street, a street running north and south, the railway crosses both streets at grade, there being a plank sidewalk on Center street at the place where it crosses the railway. On the day above mentioned, at between six and seven o'clock in the evening, the deceased and her sister, Mrs. Richards, were walking along the sidewalk on Center street, going west, and as they came near the track, they observed what they supposed to be a train approaching from the north-west. Mrs. Richards asked the deceased whether there would be time to cross, to which the latter replied: "Yes, plenty; it is way beyond the depot." They were then on the side-track, which was but a few feet from the main-track. Mrs. Richards testifies that they quickened their speed somewhat, and passed on to the main-track, and just as the witness stepped over the west rail of that track, she looked around and saw that the engine was near them and coming very rapidly. She escaped, but the deceased, who was on her left, was caught and carried along by the side of the engine for some distance, and died of the injuries thereby received in a very few minutes.

The engine at the time was drawing no train, but had just left a construction train on the defendant's road two or three miles north-west of Leroy, and was on its way to Urbana, where the engine and men were to remain over Sunday. The

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Opinion of the Court.

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evidence tends to show that, at the time the deceased was killed, it was running at a very high rate of speed, its speed, as estimated by some of the witnesses, being as high as fifty miles an hour.

Of course, to warrant a judgment in favor of the plaintiff, it must appear from the evidence that the defendant was guilty of negligence as charged in the declaration, and that the deceased was in the exercise of ordinary care. That the evidence tends to convict the defendant's servants in charge of the engine of negligence as alleged is, we think, too plain for argument. Not only was the engine being run at a rate of speed prohibited by the ordinance, but at a rate which, under all the circumstances, the jury might fairly pronounce negligent, even without reference to the ordinance. As to the care exercised by the deceased, all that need be said is, that no conduct on her part is shown which can be held to be negligent *per se*. Whether her attempt to cross the track at the time she did was negligent must depend upon the circumstances shown by the evidence, such as the apparent distance from her of the approaching engine, the speed at which it seemed to be running, and her right to rely upon the probability that its speed would not exceed that permitted by the municipal ordinance. These were all facts, or matters of law and fact combined, and the question whether she was guilty of contributory negligence was therefore a question for the jury. All controverted facts having been conclusively settled by the judgment of the Appellate Court adversely to the defendant, the verdict of the jury as to the contributory negligence of the deceased is not open for review in this court.

Nothing remains for consideration here except such questions as are raised by the assignments of error which call in question the rulings of the trial court in its instructions to the jury. It sufficiently appears from what has been said, that the court properly refused the defendant's request that the jury be peremptorily instructed to find a verdict in its favor.

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Opinion of the Court.

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There was certainly evidence sufficient to justify as well as require a submission of the case to the jury, and that being the case, an instruction to find a verdict for the defendant would have been erroneous.

Complaint is made of the first instruction given at the instance of the plaintiff, which told the jury that if they believed from the evidence that Emily Humphrey was exercising ordinary care for her own safety, "and came to her death by reason of the negligent act of the defendant, as charged in the plaintiff's declaration," then the jury should find the defendant guilty. The objection urged to this instruction is, that it assumes as a fact that the defendant was negligent, as charged in the declaration, and submitted to the jury the mere question whether the deceased came to her death by reason thereof. It can not be denied that the instruction is somewhat loosely drawn, and if construed strictly, and without reference to the other instructions given, it is undoubtedly obnoxious to the criticism thus made. But as several other instructions were given in which the question of the defendant's negligence was directly and clearly submitted to the jury to be determined by them from the evidence as a question of fact, we can not think that the jury could have been misled into supposing that the court intended to assume that the defendant was negligent, or to instruct them as to their verdict on that basis. The error, if it was one, was corrected by the other instructions, and could not have prejudiced the defendant.

The plaintiff's second instruction attempts to state the doctrine of comparative negligence as heretofore recognized by this court, but omits the hypothesis that the deceased, at the time she was killed, was in the exercise of ordinary care. If since the more recent decisions of this court, the doctrine of comparative negligence can be said to have any further place in our system of jurisprudence, it is very clear that no plaintiff can recover upon the ground of mere negligence who was not himself, at the time of the injury complained of, in the exer-



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Opinion of the Court.

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cise of ordinary care. The instruction then, in any point of view, was erroneous. But as several instructions were given at the instance of the defendant in which the rule was clearly and repeatedly laid down that, unless it was shown that the deceased, at the time of her death, was in the exercise of ordinary care, no recovery could be had, we can not think that the jury could have supposed that in the absence of such care on her part, the plaintiff would be entitled to a verdict, or that the omission of the hypothesis from the plaintiff's second instruction could have resulted in any injury to the defendant.

The fourth instruction given at the instance of the plaintiff was as follows:

"If the jury find the issues for the plaintiff, then they should assess the plaintiff's damage at what the jury believe, from the evidence, to be a proper pecuniary compensation for damages to her surviving husband and next of kin, occasioned by her death, not exceeding five thousand dollars."

The objection urged to this instruction is, that in laying down the measure of damages, the pecuniary injuries resulting to the surviving *husband* from the death of his wife are included, it being contended that the statute by which the right of action in cases of this character is given, limits the recovery to the pecuniary injuries resulting to the *wife* and next of kin from the death of the deceased. While perhaps a strict and literal construction of the statute might give some support to this contention, we are disposed to adhere to the views expressed in *City of Chicago v. Major*, 18 Ill. 349. There a broader and more liberal construction was adopted, and one which gives to a husband a remedy for the death of his wife. We are referred to cases decided in other States where a more restricted construction has been given to similar statutes, but we are better satisfied with the construction of our statute adopted in *City of Chicago v. Major*, and under that construction the trial court was justified in giving the instruction under consideration.

## Syllabus.

Some other points are made which we do not deem it necessary to notice further than to say that they have been duly considered, and are found to be destitute of merit. After duly considering the arguments of counsel, we are of the opinion that the record contains no error for which the judgment should be reversed. It will accordingly be affirmed.

*Judgment affirmed.*

THE AMERICAN TRUST AND SAVINGS BANK, Assignee,

v.

THE GUEDER & PAESCHKE MANUFACTURING COMPANY.

*Filed at Ottawa May 8, 1894.*

1. BANK CHECK—assignment "for deposit"—charging back to depositor for non-payment. The payee of a check indorsed the same to his banker "for deposit," to be placed to the depositor's credit, and sent the same by mail to his banker. On receipt of the check the banker gave the depositor credit, on account, for its amount. The banker, after placing on the check, "For collection and return," forwarded it to the drawer for payment: *Held*, that the deposit of the check was, in legal effect, a negotiation of the same, so as to vest the legal title in the banker, with the right, on his part, to charge it back to the depositor in case it was not paid on presentment, and that the credit given the depositor in his account was a sufficient consideration for the assignment.

2. BANKS AND BANKERS—embezzlement—act of June 4, 1879, construed. The first section of the "Act for the protection of bank depositors," approved June 4, 1879, which makes the failure or suspension of any bank or banker within thirty days after receiving any deposit, *prima facie* evidence of an intent to defraud, on the part of such bank, etc., does not apply exclusively to criminal prosecutions under the act, but applies to civil proceedings as well, wherever acts done in contravention of that section are the subject of judicial investigation.

3. The statute making it embezzlement for an insolvent banker to receive on deposit from a depositor not indebted to him "any money, check, draft, bill of exchange, stocks, bonds or other valuable thing which is transferable by delivery," embraces in its terms checks not transferable by delivery, merely. The words "transferable by delivery," were intended to qualify the words "other valuable thing." So the re-

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200:145 Ind  
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34 LRA  
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38 LRA

## Opinion of the Court.

ing on deposit of any check, draft or bill of exchange, whether transferable by delivery or by indorsement, is within the meaning of statute.

**EVIDENCE—its sufficiency—objection on appeal.** In a proceeding against the assignee of an insolvent bank to compel the surrender of a check to a depositor on the ground of fraud in obtaining the same from the bank, it appeared that the check was produced on the hearing, but the evidence failed to show by whom it was produced. It further appeared that the case was heard upon the tacit assumption that the assignee had possession of the check, the prosecution and defense being conducted wholly on other grounds. The objection that the assignee failed to show that the assignee had the check was not made in the trial court: *Held*, that there was no such failure of proof as to require a reversal.

**APPEAL** from the Appellate Court for the First District;— argued in that court on appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding.

**MESSRS. MORAN, KRAUS & MAYER**, for the appellant.

**MESSRS. WEIGLEY, BULKLEY & GRAY**, for the appellee.

**Mr. JUSTICE BAILEY** delivered the opinion of the Court:

This was a petition, in the matter of Herman Schaffner and A. G. Becker, insolvents, presented to the County Court, the Gueder & Paeschke Manufacturing Company, praying for an order requiring the assignee of the insolvents to surrender and deliver up to the petitioner a certain check deposited by it with the insolvents prior to the execution of their voluntary assignment. The facts, about which there seems to be little if any dispute, are these:

On the 2d day of June, 1893, and for some time prior thereto, Herman Schaffner and A. G. Becker were co-partners in a business as private bankers, in the city of Chicago, under the firm name of Herman Schaffner & Co. The petitioner, the Gueder & Paeschke Manufacturing Company, is a corporation organized under the laws of the State of Wisconsin, having its principal office and place of business in the

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Opinion of the Court.

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city of Milwaukee. That company, for some time prior to the date above mentioned kept a deposit account with Schaffner & Co., and on June 1, 1893, it forwarded to them by mail a check of which the following is a copy:

"No. 17,047.

"ATCHISON, KAN., May 29, 1893.

"*Blish, Mieze & Silliman Hardware Co.*:"

"Pay to the order of the Gueder & Paeschke Manufacturing Company, three hundred and sixty-four 15/100 dollars.

"To First National Bank, Atchison, Kansas.

"THE BLISH, MIEZE & SILLIMAN HARDWARE CO.,

E. A. MIEZE, *Treasurer.*"

Before mailing the check, the petitioner placed thereon the following indorsement: "For deposit with Herman Schaffner & Co., to the credit of Gueder & Paeschke Man'g Co."

This check was received by Schaffner & Co. on June 2, 1893, in the morning, and they immediately gave the petitioner a credit on account for its amount, and after placing upon it the following indorsement: "For collection and return, June 2, 1893, account of Herman Schaffner & Co., Chicago, Ill.," forwarded it to the place of residence of the drawee for collection. On June 3, the day following, A. G. Becker, who was then the surviving partner of the firm, made a voluntary assignment for the benefit of creditors, to the American Trust and Savings Bank, as assignee. On June 5, 1893, payment of the check was stopped, and on that day it was presented for payment and protested for non-payment.

The petition, which was filed August 24, 1893, set up, in substance, the foregoing facts, and also alleged that Schaffner & Co., at the time of receiving the check knew that they were insolvent, and received it well knowing that they were about to fail, and in fraud of the rights of the petitioner, and also that the petitioner never received any benefit or consideration whatever from Schaffner & Co. for the check, and that there was then due the petitioner on its deposit account, over and above the amount of the check, the sum of \$116.37.

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Opinion of the Court.

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he assignee answered denying all the equities of the petition, and a hearing being had on pleadings and proofs, the county Court found against the petitioner, and dismissed the petition for want of equity. On appeal to the Appellate Court, that order was reversed, and the cause was remanded with directions to enter an order requiring the assignee to surrender the check to the petitioner. From that judgment, the assignee now appeals to this court, the Judges of the Appellate Court having duly certified that the cause, although involving less than \$1000, involves questions of law of such importance, both on account of principal and collateral interest, that it should be passed upon by this court.

It was admitted by counsel at the hearing, that, upon receipt of the check, Schaffner & Co. gave the petitioner credit for its amount on petitioner's deposit account, the same as though it had deposited that amount in cash, and that the petitioner thereby became entitled at once to draw its checks against such deposit. And it was also admitted that, by the custom and business usage prevalent among bankers, Schaffner & Co., if they had remained solvent, would have had the right, in case of the dishonor of the check for any reason, to get back the amount of it in their account with the petitioner.

We think it clear that the deposit was in legal effect a negotiation of the check, so as to vest the legal title thereto in Schaffner & Co., with the right on their part to charge it back to the petitioner's deposit account, in case it should not be paid on presentment; and we also think that the credit given to the petitioner in its account, was a sufficient consideration for the assignment of the check. The transaction then was one which, in the absence of fraud, would have passed the title of the check irrevocably to Schaffner & Co., and the claim of the petitioner to relief must therefore rest solely upon its allegation of fraud, thus enabling it to rescind the transaction and reclaim the check on that ground.

## Opinion of the Court.

The fraud alleged consists of the act of Schaffner & Co., as bankers, in receiving the check on deposit, after they had become insolvent, and with knowledge of their insolvency and of their impending failure, thereby occasioning the loss to the petitioner of the amount of the deposit. That such act, if proved, constituted a fraud upon the depositor can not be doubted, and the question here is, whether the fraud as alleged is established by the evidence. The fact relied upon as proof is, that on the day next after receiving the deposit, Schaffner & Co., or rather Becker, the surviving partner of the firm, failed, suspended, and executed a voluntary assignment for the benefit of creditors, and that fact, as is claimed, is, by the statute, made *prima facie* proof of fraud.

The first section of the "Act for the protection of bank depositors," approved June 4, 1879, provides that, if any banker shall receive from any person or corporation not indebted to him, "any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery," when at the time of receiving the deposit, such banker is insolvent, whereby the deposit so made shall be lost to the depositor, the banker so receiving such deposit shall be deemed guilty of embezzlement, and upon conviction thereof, shall be fined in a sum double the amount of the sum so embezzled and may also be imprisoned in the penitentiary not less than one nor more than three years. And the section further provides as follows: "The failure, suspension, or involuntary liquidation of the banker, broker, banking company, or incorporated bank, within thirty days from and after the time of receiving such deposit, shall be *prima facie* evidence of an intent to defraud, on the part of such banker, broker or officer of such banking company or incorporated bank." Laws of 1879, page 113; 1 Starr & Cur. Stat. 776.

It seems plain that, if this statute can be held to apply to this case, it is proved, *prima facie*, that Schaffner & Co. received the check with intent to defraud the petitioner, and as their

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Opinion of the Court.

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ire has resulted in a loss to the petitioner of the deposit, at least of a considerable part of it, the fraud thus intended accomplished. And as no effort was made at the hearing but the *prima facie* presumption raised by the statute, the proof of a fraud both intended and consummated must be needed for all the purposes of this proceeding to be conclusive. But it is urged that the statute is a part of the criminal law of the State, and that the *prima facie* presumption thereby created is intended to apply only in criminal prosecutions under the act and can not be availed of in aid of a civil suit brought by the petitioner against an insolvent banker or his assignee. In this view we are unable to concur. The statute, though published by the compilers as a part of the Criminal Code, is not a part of it, but is a separate act, passed, as its title indicates, "for the protection of bank depositors," and while it is in part, perhaps mainly, penal in its provisions, so as to make its classification as a part of the Criminal Law of the State not inappropriate, it was also intended, we think, to apply in cases of civil proceedings. Thus section 4 of the act makes it unlawful for savings banks to assume certain liabilities whereby deposits may become jeopardized or impaired, and declares all such liabilities to be null and void, but imposes no penalty. It is difficult to see how any criminal prosecution can be instituted under that section, and its only application remedies, therefore, would seem to arise in civil cases where obligations assumed in contravention of its provisions are sought to be enforced. So the first section provides that certain acts by bankers shall constitute embezzlement, and prescribes their punishment, and then it declares what acts shall constitute *prima facie* evidence of an intent to defraud. We see no reason why the rule of evidence established by this latter clause should be held to apply exclusively to criminal prosecutions, but think it applicable to civil proceedings as well, wherever acts done in contravention of the provisions of the act are the subject of judicial investigation.

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Opinion of the Court.

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It is urged in the next place that, conceding that the statute applies to civil proceedings, the check in question is not within its terms. The statute, as we have seen, makes it embezzlement for an insolvent banker to receive on deposit from a depositor not indebted to him, "any money, check, draft, bill of exchange, stocks, bonds or other valuable thing which is transferable by delivery," and the contention is, that the clause, "transferable by delivery," qualifies each of the preceding specifications, and therefore, as the check in question was payable to the order of the payee, and transferable, not by delivery but by indorsement, it was not a security in respect to which the offense of embezzlement created by the first section of the statute could be committed. We are not disposed to adopt the construction of the statute here suggested. It does not seem to us to be the most natural and obvious meaning of the language employed, and we know of no canon of construction which would require its adoption. The words "transferable by delivery," in our opinion, were intended to qualify the words "other valuable thing" only, and it follows that the receiving on deposit of any check, draft or bill of exchange, whether transferable by delivery or by indorsement, is within the meaning of the statute. The construction contended for would render the statute practically nugatory, as applied to commercial paper of the classes indicated, as in the ordinary course of business, paper of that character is usually drawn payable to the order of the payee, so as to be transferable only by indorsement.

It is finally urged that there is no evidence tending to show that the check sought to be recovered by the petitioner ever came into the possession of the assignee. It must be confessed that the evidence on that point is slight. The check was produced at the hearing, and was offered in evidence by the counsel for the petitioner, but the record fails to show by whom it was produced. It does appear, however, that it was in the possession of the insolvents the day prior to the



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Opinion of the Court.

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ution of the assignment, and that it was forwarded by n for presentment to the drawee for payment. It was sent and protested for non-payment two days after the assignment was executed, and in the usual course of business could have been returned to Schaffner & Co., and thus have come into the possession of the assignee.

The course pursued by counsel in the production of evidence at the hearing was somewhat peculiar, as most of the evidence produced consists of admissions of counsel, to be gleaned out from a somewhat protracted colloquy between them, consisting in part of mutual discussions of the questions at issue, in part of denials and part of admissions, but in no part of the colloquy, or elsewhere, is there the slightest suggestion that the check which the petitioner was seeking to recover was not in the possession of the assignee. If the fact were otherwise, it is most remarkable that no assertion of it was made, for it alone would have been a complete defense to the petition. It is manifest that the cause was heard upon the tacit assumption by both parties that the assignee had possession of the check, and both the prosecution and defense were conducted wholly on other grounds. The production of the check was an act which must have occurred at the hearing, and if it was produced by any one other than the assignee, the fact could not have escaped the attention of its counsel. The point was not raised in the County Court, and is insisted upon for the first time on appeal, and we are inclined to hold that a sufficient inference legitimately arises from the conduct of counsel to justify the court in holding, on appeal, that there is no such failure of proof as to the possession of the check as necessitates a reversal by us of the judgment of the appellate Court.

We are disposed to concur in the conclusion reached by the appellate Court, and its judgment will therefore be affirmed.

*Judgment affirmed.*

## Syllabus.

## THE CONSOLIDATED COAL COMPANY

v.

JOSHUA S. PEERS *et al.**Filed at Mt. Vernon June 19, 1894.*

1. **CONTRACT—rule of interpretation.** The great rule for the interpretation of covenants is, to so expound them as to give effect to the actual intent of the parties, collected, not from a single clause, but from the entire context. The scope and end of every matter are to be considered, and if these be satisfied, then is the matter itself and the intent thereof also satisfied.

2. **SAME—liquidated damages.** If, from the nature of the contract, the damages can not be calculated with any degree of certainty, or if there are peculiar circumstances contemplated by the contract, the stipulated sum will be held to be liquidated damages.

3. **MINING LEASE—construed as to time of payment by the lessee.** A declaration alleged that by the terms of a mining lease the lessee agreed to begin mining coal within twelve months from its date, and to guarantee the lessor a yearly royalty of not less than \$1200 after the expiration of twelve months from the date, and that if, after the expiration of one year, no coal should be mined, the lessee should pay monthly installments of \$100 on its guarantee of \$1200 a year, and said payments should be considered as advanced royalty; and said lessee was to have the right to mine coal sufficient to make the amount of coal mined equal to the amount of royalty paid, provided the royalty should not be less than \$100 per month. The royalty to be paid was three-eighths of a cent per bushel, and it was alleged that such royalty should be paid monthly, on the 20th day of the month, for coal mined the preceding month: *Held*, that the word "royalty" applied not only to the three-eighths of a cent per bushel to accrue from coal actually raised, but also to the monthly payments of \$100 to accrue upon the guaranteed yearly royalty of not less than \$1200.

4. **SAME—whether a lease or mere license.** An instrument under seal which invests the grantee or lessee with the "sole and exclusive right" to mine, and operate in coal, on certain lands, which grant is not limited to any particular vein or stratum, but extends to all coal under said land, and reserves an annual rent or royalty for the coal mined, is not a mere license, but is a lease. A license is an authority to do a particular act or acts upon another man's land without possessing any estate therein. A lease of the right and privilege to mine or take away stone or coal from the lessor's land is the grant of an interest in the land, and not a mere license to take stone or coal.

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Syllabus.

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**SAME—recovery of rent reserved.** A provision in a lease for mining, that the lessee or his assigns shall pay a royalty of \$1200 a year, payable monthly, whether any coal is mined or not, is a reasonable one, and may be enforced as liquidated damages.

In an action upon the covenant in a mining lease to pay to the lessor a royalty on coal mined, not less than \$1200, it is not necessary to allege in the declaration that there was minable coal that the defendant ought to have taken out, in the absence of any covenant on part of the lessor as to the extent of the coal in the land leased. In such case, if there was any fact in existence which would be a bar to the action, the burden is on the lessee or his assignee to plead and prove it.

**ESTOPPEL—to claim a lease is a mere license.** In an action by the lessor of coal land, against the assignee, the declaration averred the leasing of the lease under seal, whereby the plaintiff leased, set over and assigned to the lessee, for the term of twenty-five years, the sole and exclusive right of mining and operating in coal on the land described; that the lessee, by its deed, granted, bargained, sold, assigned and transferred to the defendant the coal underlying said land, together with all the rights and appurtenances thereunto appertaining, the same were conveyed or assured by such lease, and thereby conveyed with the defendant that such lessee was seized of a perfect title in the property thereby conveyed, and that the defendant accepted the deed, and took and retained possession of the property conveyed by it, and used and controlled the premises: *Held*, that from these averments the defendant was estopped from setting up the claim that the supposed lease was a mere personal license, and therefore not assailable.

**LANDLORD AND TENANT—liability of assignee of lease not defeated by assignment.** If it be conceded that an assignee of a lease is discharged from liability for subsequent breaches by his assignment of the lease, yet his transfer will not have the effect of discharging him from breaches of the covenant already committed, when there was a privity of estate between him and the lessor, and an implied provision to pay the damages occasioned by such breach.

**PLEADING—declaration—for recovery on contract for payment in installments.** Any number of installments due upon an instrument in writing may be declared for and recovered upon in one and the same count.

**PRACTICE—waiver of objection to evidence.** If there is any ground for objection to a lease given in evidence, the party should make such objection in the trial court, and if overruled, take an exception, and assign error to do so he can not make the objection for the first time in a writ of review.

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Opinion of the Court.

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11. *SAME—trial by court—proposition that plaintiff can not recover.* On a trial by the court without a jury, a request by the defendant to hold, as a matter of law, that there can be no recovery on the evidence, is equivalent to a demurrer to the evidence, and raises the question of law whether the evidence, with the most favorable intendments granted it, tends to establish the case of the plaintiff.

12. A proposition of law that, under the facts proved, the plaintiff is not entitled to recover, is properly refused, if the evidence shows that the plaintiff is entitled to recover any sum.

13. *APPEALS—affirmance by Appellate Court settles all disputed questions of fact.* Where a judgment is affirmed by the Appellate Court, the judgment of that court is final, not only in respect to the principal and ultimate facts upon which the cause of action is based, but also in respect of the evidentiary and subordinate facts, which are mere evidence of the principal facts. This consequence extends to all inferences and deductions to be drawn from the evidentiary facts.

14. Where a common law case is tried by the judge, without a jury, and no question is made as to the ruling on the admission or exclusion of evidence, and no written propositions of law are submitted, and the only exception taken is upon the rendition of the judgment, and the Appellate Court affirms such judgment, the record, on appeal from the Appellate Court, will not present any question for this court.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Madison county; the Hon. W. H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS, for the appellant.

Mr. J. G. IRWIN, and Mr. W. H. KROME, for the appellees.

Mr. JUSTICE BAKER delivered the opinion of the Court:

Joshua S. Peers and Adeline C. Peers, lessors in a mining lease made to the Abbey Coal and Mining Company, brought assumpsit, on the 26th day of September, 1888, against the Consolidated Coal Company of St. Louis, as assignee of the lease by deed poll from said Abbey Coal and Mining Company. No demurrer was interposed to the declaration, and the issue joined upon a plea of non-assumpsit was submitted to the court without a jury. The finding of the court was for

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Opinion of the Court.

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plaintiffs, and the damages were assessed at \$1200. A motion for a new trial was made, which was overruled, and exception taken, and thereupon the defendant moved in arrest of judgment, on the ground that the declaration set out no cause of action; but this motion also was denied, and exception taken. The court then rendered final judgment on the findings for the damages assessed and for costs. The case was then taken by appeal to the Appellate Court for the Fifth District, by the defendant, and the judgment affirmed, whence appellant brought the record here by this appeal. It is expedient to so transpose matters as that the last procedure had in the trial court (outside of the mere entry of judgment and the orders consequent thereon) shall be considered first, for if the contention of appellant, in its motion in arrest, that the declaration of appellees sets out no cause of action, is sustained, then that is an end of the matter, at least so far as the present appeal is concerned.

Four reasons are urged why the declaration is bad, and insufficient to sustain the judgment. We will take them up successively.

*First*—The first ground urged is, that the suit was brought September 26, 1888, to recover the supposed guaranteed royalty for twelve months elapsing between September 20, 1887, and September 20, 1888; that the year established by the supposed lease commenced on the 17th day of each December; that said royalty was payable annually, in December; that the year ending December 17, 1888, had not elapsed when the suit was begun, and that the absolute guaranty in the supposed lease set up in the declaration is "a yearly royalty of not less than \$1200;" that there the covenant ceases, and all that follows after the words "and if" is a privilege reserved, instead of a covenant.

That part of the declaration upon which this objection is founded, is, as we find it stated in appellant's abstract of record, as follows: "That the plaintiffs, on the 17th day of

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Opinion of the Court.

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December, 1870, made a certain coal lease to the Abbey Coal and Mining Company for the term of twenty-five years from its date, whereby they granted to the said company the sole right to mine the coal from under the land described in said lease; that the said Abbey Coal and Mining Company agreed to begin mining coal from the said land within twelve months of the date of said lease, and to guarantee the plaintiffs a yearly royalty of not less than \$1200 after the expiration of twelve months from the date last aforesaid; that if, after the expiration of one year, no coal should be mined from the said tract of land, and the lessee should pay the monthly installments of \$100 in their guarantee of \$1200 a year, said payments should be considered as advanced royalty, and said lessee was to have the right to mine coal sufficient to make the amount of coal mined equal the amount of royalty paid, provided that the royalty paid should not be less than \$100 per month; that the said lessee should carry on the work in a good and workmanlike manner, and take as much coal from said land as a proper regard for the safety of the mine would admit, and to pay the plaintiffs a royalty of three-eighths of a cent per bushel of eighty-five pounds for all coal mined, except such as was taken from shafts, entries and courses, and such as was used at the mines for stationary engines, and that such royalty should be paid monthly, on the 20th day of the month, for coal mined the preceding month."

It was said by Chief Justice Gibson in *Walker v. Physic*, 5 Barr. (Pa.) 193, that the great rule for the interpretation of covenants is, to so expound them as to give effect to the actual intent of the parties, collected, not from a single clause, but from the entire context. And in *Reniger v. Fogossa*, Plowd. 18, it was said: "The scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself, and the intent thereof, also satisfied." The doctrine of these cases has been

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Opinion of the Court.

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nently affirmed by this court, and announced in decisions numerous to specify.

Applying this doctrine to the lease declared on in the *narr.*, find that the term "royalty" is applied by the parties, not to the three-eighths of a cent per bushel to accrue from actually mined, but to the monthly payments of \$100 to be due upon the guaranteed "yearly royalty of not less than \$1200." Indeed, it is expressly charged in the declaration that it was agreed that "said payments should (in the lease if the word used is "shall") be considered as advanced royalty." The "royalty" was not to be less than \$100 "paid every one month," and it is averred in the declaration "that a royalty should be paid monthly, on the 20th day of the month, for coal mined the preceding month." In view of the text, and in view of the fact that if no date of payment had been fixed by the clause last quoted the monthly payments of advanced royalty," or guaranteed royalty, would have been due on the 17th day of each month, instead of upon the 20th of each month, it seems clear that it was not intended by the parties that said clause above quoted should be limited to royalty upon coal actually mined. In other words, we think that the meaning of the lease, as deducible from the averments of the declaration, when taken as a whole, is, that the guaranteed royalty, although fixed on a yearly basis of \$1200, was to be paid in monthly installments of \$100 each, and the time when such respective payments should be made were duly designated. We may add, that any number of installments upon an instrument in suit may be declared for and recovered upon in one and the same count. (*Godfrey v. Buckter*, 1 Scam. 450.) In our opinion the first objection made to the declaration should not be sustained.

*Second*—The second point made is, that the supposed lease set up in the declaration is a mere personal license, and was not assignable.

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Opinion of the Court.

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The declaration avers that "the plaintiffs, by their certain instrument in writing and under seal, commonly called a lease, \* \* \* leased, set over and assigned unto the said Abbey Coal and Mining Company, for the full term of twenty-five years from the date thereof, the sole and exclusive right of mining and operating in coal on the tracts of land above described," etc. And it further avers, that "when, etc., by its deed of that date, \* \* \* it, the said Abbey Coal and Mining Company, granted, bargained, sold, assigned, transferred and set over to the defendant the coal underlying said tracts of land, together with all the rights, privileges and appurtenances thereunto appertaining or belonging, as the same were conveyed or assured by said lease, \* \* \* thereby covenanted and agreed to and with the defendant that it was seized of a perfect title to the property thereby conveyed," etc.

It seems to us that appellant, by accepting said deed, and taking and holding possession under it, of the property conveyed, and using, controlling and enjoying such property, all which further facts are also alleged in the declaration, should be estopped from making the claim now under consideration. But be that as it may, the law is against the validity of the claim. The lease declared on by appellees is not a mere personal license. A license is an authority to do a particular act or acts upon another man's land without possessing any estate therein. (1 Washburn on Real Prop. chap. 12, sec. 2, p. \*398.) The lease here involved invests the lessee with the "sole and exclusive right" to mine and operate in coal on certain described lands. The right granted is not limited to any particular vein or stratum, but extends to all coal under said lands, and it is exclusive of the whole world, including the lessors themselves, and is for the full term of twenty-five years from the date thereof. The law, as we understand it, is, that a lease of the right and privilege to mine or take away stone or coal from the lessor's land is the grant of an interest in the land, and not a mere license to take stone or coal. (*Caldwell*



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Opinion of the Court.

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*v. Fulton*, 31 Pa. St. 475, and authorities cited therein; *Harlan v. Lehigh Coal Co.* 35 id. 287.) This second point made by appellant is not tenable.

*Third*—The third ground of objection is, that the supposed guaranty of \$1200 a year as royalty merely fixes a penalty, and the appellees could only recover for its breach such damages as the proof shows that they actually suffered, so that an action for the \$1200, as for liquidated damages, does not lie. As authority for its contention in support of this position appellant places its principal reliance upon the decision of this court in *Scofield v. Tompkins*, 95 Ill. 190. In that case the question was, whether the \$22,770 named in the agreement as the price of the land, and also as liquidated damages in case that sum was not paid by a fixed day, and time of payment being made of the essence of the contract, may be recovered, or only such damages as can be shown to have been actually sustained by breach of the agreement. The plaintiff still had the land, and by his action was seeking to recover its full price and also retain the land. This court held that the parties may agree upon any sum as compensation for the breach of a contract which does not manifestly exceed the amount of the injury suffered, but when it is manifestly above that sum, and the damages are such as can readily be shown, such sum so inserted in the contract will be regarded merely as a penalty to insure prompt payment or performance. The court, in delivering its opinion, said: "The fact that the parties fix a sum to be paid and call it liquidated damages does not always control the question as to the measure of the recovery for the breach of the contract." And further said: "It is true, the parties are authorized to agree upon any sum as compensation for the breach of the contract which does not manifestly exceed the amount of the injury suffered. This is believed to be the doctrine of the courts, and to be well sustained by authority." And the court, in its opinion, quoted from *Sedgwick on the Measure of Damages*, page 493, as fol-

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Opinion of the Court.

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lows: "If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will be inclined to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term 'liquidated damages' will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties." And to this quotation from Sedgwick the court then added these words: "The weight of the authorities sustains these propositions."

We understand the rule to be, that if, from the nature of the contract, the damages can not be calculated with any degree of certainty, or there are peculiar circumstances contemplated by the contract, the stipulated sum will be held to be liquidated damages. (See 5 Am. and Eng. Ency. of Law, p. 25, and the numerous cases cited in note 3; also, in same volume, the cases cited on p. 24, note 2.) We think the rule last above stated is applicable to the case at bar, and further think that *Scofield v. Tompkins*, *supra*, supports the contention of appellees herein, rather than that of appellant. Besides this, the clause in question was, under the circumstances of the case, an eminently reasonable one. Without it, the effect of the contract would have been to divest appellees of all control over the coal under their land for the long period of twenty-five years, and would have left them without any power to compel the lessee or its assigns to take out a bushel of it, and without any assurance or guaranty of a cent of income from it. The lessee was a coal mining company, and must be presumed to have been well informed in respect to the subject matter in regard to which it was contracting, and it is manifest from the terms of the lease, as they are set forth in the declaration, that the parties believed that the royalty would exceed, instead of fall below, \$1200 a year. This is obvious from the fact that said sum is fixed as the minimum

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Opinion of the Court.

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of the royalty to be paid. The third objection urged to declaration is overruled.

*Fourth*—The fourth and last objection made to the declaration, that in order to show a cause of action grounded upon supposed guaranty to pay \$1200 as annual royalty, the declaration should allege that there is minable coal that the plaintiff might take out.

*Requis of Bute v. Thomson*, 13 Meeson & Welsby, \*487, an action of covenant, and the defendants had expressly covenanted that they, etc., should and would raise and work 100 tons of coal in each and every year during the term, to pay at the rate of eight pence per ton royalty for the same, or in money, annually, £433, 6s. 8d. each year, as fixed whether coals should be wrought or not, and also nine pence upon each ton over and above that quantity, to what extent the same might be wrought. The Court of Exchequer, in its opinion delivered by Pollock, Chief Baron, held that the stipulation for a fixed rent, coupled with a covenant that coal should be wrought to that extent, and if above it, there should be a payment of nine pence for each ton over and above, does not carry with it, by any implication, a condition that there should be coals to that amount capable of being wrought; but that it was a stipulation on the part of the defendants that they would work and get that quantity, and that if they did not get it they would pay a fixed rent to the landlord, and that a condition can not be imported into the covenant that there should be coals to that extent, and that that was the intention of the parties they should have expressed it, and the judgment was for the plaintiff.

*Harlan et al. v. Lehigh Coal, etc. Co.* 35 Pa. St. 287, was an action upon a coal lease, brought by Harlan and others, who were lessees, against said corporation, the lessor, and the declaration alleged was, that the supposed mines were not coal mines, and did not contain stone coal, contrary to the tenor and effect of the defendant's covenant. At the trial the court

13—150 ILL.

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Opinion of the Court.

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below charged the jury as follows: "The defendant does not covenant for coal in any of the veins. He lets them, and the plaintiffs take them, subject to the ordinary risk of mining, without any covenant, express or implied, of the existence of coal, or of the quantity or of the quality of coal." The judgment was affirmed, and the court, in its opinion, said: "It was undoubtedly coal veins that were intended to be leased, and if the parties were mistaken about the fact, the result would be a right to dissolve the contract, and not a right to have a different contract in its stead. It is apparent that the R. and S. veins were known subjects of contract, that they were supposed to exist in the lessor's land as they did elsewhere, and that the lease was intended as a grant of the right to find and work them, but we have nothing that entitles us to construct a warranty that the lessees should be able to find and work them."

Appellant calls our attention to no authority in conflict with the doctrine of these two cases, and we have no knowledge of the existence of any such authority.

But there is another ground upon which the decision of this matter can be placed. The lessee expressly covenanted to pay this \$1200 royalty, and appellant, when it became assignee of the lease, also became liable to perform the covenants of the lease by reason of the privity of estate, and, in contemplation of law, promised so to do. If there was any fact in existence which would be a bar to the action brought to enforce such liability and promise, the burden would be upon it to plead and prove such fact. This would seem to be in consonance with the principles of pleading. That such is the recognized practice would seem to be indicated by one of the cases last cited. In *Marquis of Bute v. Thomson*, the report shows that the defendants in their plea craved oyer of the indenture of lease, and set it out in full, and then pleaded as to the alleged breach of covenant in the declaration relating to the non-payment of half a year's rent, that, etc., said

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Opinion of the Court.

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became and was, etc., greatly exhausted, and that, etc., than one-fourth part of such 13,000 tons, and no more, left and remained to be worked, etc., under and by virtue of indenture, etc., and it was upon a demurrer to this that the case was decided, the point marked for argument on the part of the plaintiff being, that the covenant was absolute covenant to pay the money rent, and not a conditional covenant.

There being no merit in this fourth ground of objection to the declaration, and there being, as we have seen, no merit in any of the other objections urged against it, it results that the trial court committed no error when it overruled the motion in arrest of judgment.

It is assigned as error that the circuit court erred in denying the motion for a new trial, and one of the specifications in the motion entered in that court for a new trial is, that "the court admitted improper evidence at plaintiff's instance." This objection is called by counsel to a supposed defect in the lease, with respect to the manner in which it was signed and executed on behalf of the Abbey Coal and Mining Company. It appears, however, that the defendant below interposed no objection to the introduction in evidence of either said lease or other testimony that was offered by the plaintiffs below. If the defendant had any objection to the lease going in evidence, it should have made that objection in the trial court, and if such objection was overruled, should have taken an appeal. Not having done so it can not interpose an objection, for the first time, in a court of review.

We find, however, that in another part of his brief and argument counsel for appellant makes the claim that appellant requested the circuit court to hold, as matter of law, that there should be no recovery on the evidence, and that this was equivalent to a demurrer to the evidence, and raised the question whether or not there was any evidence which, with the favorable intendments granted it, tended to establish the

## Opinion of the Court.

case of appellees. The first clause of this claim is true, as matter of fact, and the other clause is correct as matter of law. (*Chicago, Rock Island and Pacific Railroad Co. v. Lewis*, 109 Ill. 120; *Blanshard v. Lake Shore and Michigan Southern Railway Co.* 126 id. 416.) In connection with this claim, appellant states, in substance, that the declaration avers that appellees made a certain lease to the Abbey Coal and Mining Company, which that company afterwards assigned to the appellant. It is then urged that there is no evidence which connects said Abbey Coal and Mining Company with the land or the lease; that the instrument is executed by Joshua S. Peers, Adeline C. Peers and E. J. Crandall, and is sealed with their private seals, and acknowledged by them in their several individual capacities; that it is the act and deed of the three persons who signed and sealed it, and that the description of the parties in the body of the instrument must yield to the attestation and signatures thereto attached,—citing as authority in that behalf the case of *Northwestern Distilling Co. v. Brant*, 69 Ill. 658. The conclusions that appellant draws from these premises are, that neither the Abbey Coal and Mining Company nor appellant ever had any privity of contract or privity of estate with appellees, and that therefore the evidence did not tend to establish the case of appellees.

In the premises of the indenture, J. S. Peers and Adeline C. Peers are named as parties of the first part, and the Abbey Coal and Mining Company is named as party of the second part, and in all subsequent clauses and parts of the lease they are spoken of as the parties of the first part and party of the second part, respectively. The attestation reads as follows:

“In witness whereof the said parties have this day subscribed their names and affixed their seals, dated December 20, 1870.

JOSHUA S. PEERS, [Seal.]

ADELIN C. PEERS, [Seal.]

E. J. CRANDALL, *President*. [Seal.]”

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Opinion of the Court.

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The case of *Northwestern Distilling Co. v. Brant*, *supra*, relied on by appellant, was almost the converse of this. There, in the premises of the lease, Edward F. Lawrence, president of the Northwestern Distilling Company, was named as party of the second part, etc., and the attestation was: "In testimony whereof the said parties have hereunto set their hands and seals," etc. Then followed the name and seal of Brant, the lessor, and just below it, "Northwestern Distilling Co. [Seal.] By Edward Lawrence, President." This court, in its opinion, said: "The only circumstance which raises any difficulty is, that in the commencement of the lease, Lawrence, president of the company, is described as the party of the second part, and the covenant is by 'the said party of the second part.' The contract, as claimed, is one made by a corporation, which can act only by its agents, and it is apparent upon the face of the instrument that Lawrence does not act individually, but as president of the company, *for* the company. Had he executed the instrument in his own name, *for* the company, it would have been a good execution by the company. \* \* \* The conclusion of a lease, as well as its commencement, may be looked to for the description of the parties. The conclusion describes them to be those persons who have set their hands and seals to the instrument, and it is the signature and seal of the Northwestern Distilling Company which are set thereto, not those of Lawrence,"—and the judgment against the distilling company for breach of covenant was affirmed.

In *Phillips v. Coffee*, 17 Ill. 154, a question arose in regard to a deed of assignment from the State Bank of Illinois to certain persons, of all the lands, lots, etc., belonging to the bank. It appears from the statement of the case that the deed was signed "Thomas Mather, President," and purported to be under the seal of the bank. The court, in its opinion, said: "Its execution by the president of the bank is shown, and the seal affixed affords *prima facie* evidence that it is the seal of the bank."

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Opinion of the Court.

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In *I. C. R. R. Co. v. Johnson*, 40 Ill. 35, this court said: "This court does not know, judicially, that the railroad company has a seal, other than a scrawl, such as appears in this record, and which purports to be a seal. Moreover, this is a copy of the original bond, and the clerk could not make a *fac simile* of a corporate seal or device which might have been, and, for aught that appears, was, attached to the original bond."

In *Sawyer v. Cox*, 63 Ill. 130, it was held that a deed purporting to bind a corporation, and signed by the president or vice-president of such corporation, and not in the name of the corporation, but with a seal attached, would be presumed by the law to have been executed by sufficient authority, and that it would also be presumed that the seal annexed was the seal of the company, and in the opinion of the court the case of *Phillips v. Coffee*, *supra*, was both fully considered and fully approved.

The decisions of this court above mentioned are decisions of the fact that there was evidence in the record tending to prove the case of the plaintiffs.

It is urged that the circuit court erred in refusing to hold the following proposition, to-wit: "The court is requested to hold, that under the facts proven in this case the plaintiffs are not entitled to recover." It is manifest that there was no error in refusing to hold this proposition, even if it be conceded, for the purposes of this decision, that the assignment made by appellant to Lasurs on November 28, 1887, was a valid assignment, and had all the effect claimed for it. The admissions contained in the record show that judgment had been recovered by appellees against appellant for all the rent and royalty due under the lease up to the 17th day of September, 1887, and that judgment paid and satisfied. We have already held herein that the guaranteed royalty of \$1200 annually was payable in installments of \$100 each, due on the 20th day of each and every month during the term demised.



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Opinion of the Court.

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suit was commenced on the 26th day of September, to recover twelve of the installments of royalty, the last one having fallen due, under the terms of the lease, on the day of September, 1888. The assignment from appellant to Lasurs was put in evidence by appellant, and bears date November 28, 1887. It follows that two monthly installments of guaranteed royalty became due, under the covenants of the lease, after the 17th of September, 1887, and before the expiration of November 28, 1887, to Lasurs. During the month of that time, and at the dates when said two installments became due and default was made in their payment, appellant continued to be, and was, the tenant of appellees, and was legally liable to them for the payment of said installments. It follows that, in any event, appellees were entitled to recover \$200, and that therefore it was not error to refuse to grant judgment that under the facts proven in the case they were not entitled to recover anything.

The court also refused to hold a proposition of law submitted by appellant which reads as follows:

"The court believes, from the evidence, that the defendant, in November or December, 1887, by an instrument in writing, assigned and transferred to one Jacob Lasurs all its right, title and interest, as assignees of the lessee, in the leasehold estate mentioned, and set over to said Lasurs the leasehold estate held under said lease, then plaintiffs are not to recover in this case."

This proposition was vicious for the same reasons that the proposition last considered was vicious, for, even if it was added that the assignment of November 28, 1887, discharged appellant from liability for subsequent breaches, yet it did not and could not, have the effect of discharging it from liability for the breaches of covenant that had already taken place, and at times when there was a privity of estate between appellant and appellees, and an implied promise to pay the damages occasioned by such breaches. It is clear that there was not

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Opinion of the Court.

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manifest error in refusing to hold said proposition as law in the decision of the case.

Appellant urges that it, by accepting the deed of assignment from the Abbey Coal and Mining Company, did not, by virtue of certain language used in that deed, expressly agree to perform all the covenants contained in the lease, even after the assignment to Lasurs. That question is not presented for our decision by the record. In order to have raised and preserved that question of law for the decision of this court, it should have offered in the trial court a proposition to the effect that there was nothing in the deed poll made to it by the Abbey Coal and Mining Company, which, in law, bound it to pay the royalty accruing after the assignment to Lasurs.

It is also insisted by appellant, that it assigned the lease on the 28th day of November, 1887, to one Jacob Lasurs, and the legal effect of such assignment was to discharge it, appellant, from liability for subsequent breaches, even though it was done for the express purpose of getting rid of responsibility, and although the second assignee never took possession of the demised premises or received the lease. The proposition of law involved in this instance, also, was not embodied in a written proposition, and submitted to the court to be held as law in the decision of the case. It is true, a proposition containing some of the elements here contended for was offered, and refused, but it was coupled with another proposition which it would have been error to hold, and if such other proposition had been stricken out, it would have rendered the proposition as offered wholly senseless and nugatory.

The case was tried before the court without a jury, and the judgment of the circuit court has been affirmed by the Appellate Court. The consequence of this is to settle every question of fact against appellant. The judgment of the Appellate Court is final, not only in respect to the principal and ultimate facts upon which the cause of action is based, but also

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Opinion of the Court.

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in respect to the evidentiary and subordinate facts, which are mere evidence of the principal facts. This consequence extends to all inferences and deductions to be drawn from the evidentiary facts. *Powell v. McCord*, 121 Ill. 330; *Darlington v. Chamberlin*, 120 id. 585; *People v. Illinois and St. Louis Railroad and Coal Co.* 122 id. 506; *Hamburg-American Packet Co. v. Gattman*, 127 id. 598; *Alphin v. Working*, 132 id. 484; *Pennsylvania Co. v. Ellett*, id. 654; *Chicago, Milwaukee and St. Paul Railway Co. v. Wilson*, 133 id. 55; *Pennsylvania Co. v. Backes*, id. 255; *Consolidated Ice Machine Co. v. Keifer*, 134 id. 481.

Where a common law case is tried by the judge without a jury, and no question is made as to the ruling on the admission or exclusion of evidence, and no written propositions of law are submitted, and the only exception taken is for the rendition of the judgment, and the Appellate Court affirms such judgment, the record, on appeal from the Appellate Court, will not present any question for this court, and all it can do will be to affirm the judgment of the Appellate Court. *Myers v. Union Nat. Bank*, 128 Ill. 478; *McDonald v. Allen*, id. 521.

We have examined all the questions of law that appear upon the record, and that are so saved, by exception or otherwise, as that we have cognizance of them, and we find no error in respect thereto.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

MR. JUSTICE PHILLIPS, having heard this case in the Appellate Court, took no part in its decision here.

## Syllabus.

## THE METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY

v.

JOSEPH A. STICKNEY *et al.**Filed at Springfield June 18, 1894.*

302-25 LEA

1. **SPECIAL ASSESSMENTS—special benefits.** If property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to a greater or less degree, be likewise specially benefited. In other words, it is not such benefits as are special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value,—that is, specially benefited,—that are to be considered.

2. **EMINENT DOMAIN—set-off of benefits against damages to property not taken.** In a condemnation proceeding the court instructed the jury, that though they believe, from the evidence, that some of the property of some of the respondents "will actually be benefited by reason of the construction and operation of the petitioner's railroad, yet if the jury further believe, from the evidence, that such benefits are not special to the respondents' property, and are shared by it in common with the generality of property in the vicinity of the line of said proposed railroad, then such benefits are not to be considered in determining whether or not the property of said respondents not taken will be damaged by reason of taking a part of their property and operating and maintaining the petitioner's railroad." *Held*, that the instruction did not announce a correct rule of law, and was erroneous.

3. If a piece of property is enhanced in value, its enhancement, or, in other words, benefits to the property, can not be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties.

4. It follows that where the benefits are designated as "general benefits," "benefits common to other property," and the like expressions to be found in the decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits upon properties near it by an increase in their value, and at the same time, by the convenience afforded the general public, confer a general benefit.

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## Syllabus.

So a railroad built through a town or through the country may confer general benefit by affording additional facilities for travel and commerce, and thereby be of benefit to the community at large; but effect of such general benefits upon any particular piece of property would be impossible of ascertainment, and speculative, and it has been held that such benefits are not to be considered for that purpose.

**SAME—measure of damages to land not taken.** The measure of damages to property not taken is the difference in value of the land before the proposed construction, and what it will be afterward. Hence, benefits flowing from the proposed work upon the particular property are to be considered, and if the value of the land not taken, considered as a whole tract, or separately, is equal to its value before improvement, there is no damage to property not taken.

The damage contemplated by the constitution is an actual diminution of the present value or price caused by the construction of the road or a physical injury to the property that renders it less valuable in the market if offered for sale. The test of whether damages have been done to the land not taken, is, whether there has been a diminution of the market value of the land by reason of the proposed improvement. The effect upon the whole tract remaining after part is taken must be considered.

The consideration of benefits by which the land not taken is increased instead of being diminished in value, is not the deduction of its advantages from the damages, but it is ascertaining whether there is damage or not. It is but the estimation of damages, and seems the only fair and just mode of estimating them.

If the property is worth as much after an improvement as before, there is no damage done the same. If the benefits received from making of the improvement are equal to or greater than the loss, the property is not damaged for public use. There can be no damage to property without pecuniary loss. If there is no depreciation in value there is no damage.

The damages to property not taken must be real, and not speculative, and it must depreciate the price, or its use; and the depreciation is to be determined by comparing its value before and after the use is made which produces the injury. Any benefits thus considered should be considered, as well as injury inflicted by the structure, in estimating the damages.

Special benefits are such benefits flowing from the proposed work as appreciably enhance the value of the particular tract claimed to be benefited. On the one hand, the damages must be real and substantial; on the other, the benefits must be such as to increase the market value or use of the land, and such as are capable of

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Syllabus.

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measurement and computation. Hence, all imaginary and merely speculative damages or benefits are excluded from consideration.

12. The consideration of such benefits as tend specifically to enhance the value of the particular property is not setting off benefits against the damages to the property, but is the simple ascertainment of whether the land has been depreciated in price or worth,—that is, whether loss or damage has resulted to the owner. The fact that other property in the vicinity is likewise increased in value from the same cause, furnishes no reason for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not.

13. There can be no damage to property without pecuniary loss, or injury which lessens its value. It therefore follows that every element arising from the construction and operation of the railroad, or other public improvement, which, in an appreciable degree, capable of ascertainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it.

14. The situation of the property, the use to which it is devoted and of which it is susceptible, the character and extent of the business to which it is adapted before and after the construction of the public work, and, indeed, every fact and circumstance legitimately tending to show a depreciation or increase of the value of the property, are proper to be considered, so far as they tend to show the actual value of the land with and without the proposed taking for the public use.

15. On the other hand, a consideration of facts and circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which, in determining the injury or benefit to the particular tract of land, can not be other than conjectural or speculative, should be excluded.

16. **FORMER DECISIONS—cases explained.** In *St. Louis, Indianapolis and Springfield Railroad Co. v. Kirby*, 104 Ill. 347, an instruction was approved which excluded the consideration of any general benefit to the land occupied as a farm which a railroad might be in making a better market or convenience in travel. By approving such instruction it was not intended by this court to exclude such benefits as would appreciate the market value of the particular tract of land.

17. In *McReynolds v. Burlington and Ohio River Railway Co.* 106 Ill. 152, the jury were instructed, that if by the construction of the railroad the land would be specially benefited to the extent, or greater than, they would be damaged, then the jury should only find a verdict for the compensation for the land actually taken, which the court approved:

## Syllabus.

that the ruling was in harmony with the prior decisions of this except the case of *Keithsburg and Eastern Railroad Co. v. Henry*, 294.

In the *McReynolds* case this court used the words, "benefits on to other property," as designating those benefits which flow public generally, as distinguished from those which enhance lue of the specific property, without intending to exclude any nts arising from the improvement that tended to specifically ce the value of the particular property.

In *Chicago and Evanston Railroad Co. v. Blake*, 116 Ill. 163, the in an instruction, "under the laws of this State no benefits or tage which may accrue to lands or property in common with all property along the line of the proposed railroad," by reason of struction and operation, can lawfully be set off, etc., was under- to mean those benefits of a general nature which each tract of r parcel of property along the line of the railway shared in on by reason of increased facilities for traffic and commerce, and ce, and which, while resulting in benefit to the community at are incapable of measurement when applied to a particular tract i.

In *Harwood v. Bloomington*, 124 Ill. 48, this court held, that when id owner interposes a claim for damages to that part of the land cen, in consequence of the improvement, if the land not taken eived special benefits,—benefits not common to other property, benefits may be considered in arriving at the amount of dam- ie owner may have sustained to the property not taken. The was not called upon to define what benefits were "common to roperty," and did not attempt to do so. The sense, however, in the words were used in the opinion, is clearly indicated in the herein cited.

The rule laid down in *Keithsburg and Eastern Railroad Co. v.* , 79 Ill. 294, that the question of benefits can in no case be con- d in estimating the value of land taken or in estimating the es to land not taken, is not supported by any of the prior or ent cases.

INSTRUCTIONS—*requisites.* The jury have little to do with the and policy of the law, and instructions should be so drawn as concise and accurate statement of the law as applicable to the f the particular case. If they call the attention of the jury, in umentative manner, to matters with which they have no imme- oncern, there will be no error in their refusal.

REAL from the Circuit Court of Cook county; the Hon. DUNNE, Judge, presiding.

Mr. E. J. HARKNESS, and Mr. W. W. GURLEY, for the appellant:

Where damages are claimed as to the part of the land not taken, the only question to be determined is, what will be the effect on the market value of the remaining part. If that effect is to decrease the market value, then the property is damaged, and the extent of the decrease in market value is the measure of the damage. If, on the contrary, the effect of the construction and operation of a railroad is to increase the market value of the remainder over what it would be without such railroad, then the property will not be damaged. *Railroad Co. v. Francis*, 70 Ill. 238; *Page v. Railway Co.* id. 324; *Eberhardt v. Railway Co.* id. 347; *Railroad Co. v. Stein*, 75 id. 41; *Elgin v. Eaton*, 83 id. 537; *Hyde Park v. Dunham*, 85 id. 569; *Railroad Co. v. Haller*, 82 id. 208; *Railway Co. v. Hall*, 90 id. 42; *Rigney v. Chicago*, 102 id. 81; *Railroad Co. v. Bowman*, 122 id. 601; *Dupuis v. Railroad Co.* 115 id. 101; *Kiernan v. Railroad Co.* 123 id. 188; *Harwood v. Bloomington*, 124 id. 48; *Railroad Co. v. McDougall*, 126 id. 111; *Coal Co. v. Chicago*, 26 Fed. Rep. 415; *Atlanta v. Green*, 67 Ga. 86; *Atlanta v. Word*, 78 id. 270; *Springer v. Chicago*, 135 Ill. 552; *Railroad Co. v. Eaton*, 136 id. 9.

As to what are special benefits, as distinguished from general benefits, see *Chicago v. Larned*, 34 Ill. 203; *Rigney v. Chicago*, 102 id. 64; *Wilson v. Sanitary District*, 133 id. 443; *Bush v. Railway Co.* 13 N. Y. Supp. 908; *Bohm v. Railroad Co.* 129 N. Y. 576.

Mr. ELBERT H. GARY, for the appellees, Mr. C. M. WALKER for Stickney, Mr. GEORGE W. STANFORD for Ilett, and Mr. T. H. SIMMONS for the Grant Manufacturing Company:

As to the right to deduct benefits from the damages to the part of the land not taken, see *Railroad Co. v. Black*, 58 Ill. 34; *Railroad Co. v. Kirby*, 104 id. 345; *Railroad Co. v. Blake*, 116 id. 163; *Railroad Co. v. Aldrich*, 134 id. 9; *Harwood v.*



## Opinion of the Court.

ington, 124 id. 48; *McReynolds v. Railroad Co.* 106 id. *State v. Evans*, 2 Scam. 208; *Cemetery Ass. v. Railroad* 11 Ill. 204; *Hyde Park v. Ice Co.* 117 id. 236; *Railroad Henry*, 79 id. 294; *Upton v. Railroad Co.* 8 Cush. 600; *v. Miller*, 23 N. Y. 385; *Allen v. Charleston*, 10 Mass. *Railroad Co. v. Collett*, 6 Ohio St. 182; *Railroad Co. v.* 63 Texas, 473; *Hornstein v. Railroad Co.* 51 Pa. St. *Railroad Co. v. Waldrum*, 11 Minn. 236; *Commissioners Sullivan*, 17 Kan. 59; *Railroad Co. v. Tyree*, 7 W. Va. *Robbins v. Railroad Co.* 6 Wis. 642; *Chapman v. Railroad Co.* 33 id. 639; *Laflin v. Railroad Co.* 33 Fed. Rep. 424; *and Co. v. McDonald*, 12 Heisk. 56; *Hoscher v. Railroad Co.* Mo. 304; *Railroad Co. v. Richardson*, 45 id. 468; *v. Railroad Co.* 39 N. C. 90; *Railroad Co. v. Wicker*, 234; *Adden v. Railroad Co.* 55 N. H. 413; *Petition of and Co.* 35 id. 147; *Railroad Co. v. Forman*, 24 W. Va. *Railroad Co. v. Wiebe*, 25 Neb. 544; *Railroad Co. v. Mott*, id. 718; *Railroad Co. v. Whalen*, 11 id. 590.

JUSTICE SHOPE delivered the opinion of the Court:

It was a proceeding instituted by the Metropolitan West Elevated Railway Company for condemnation of right of cross certain lots in the city of Chicago, owned by applicant in severalty,—the appellee the Grant Manufacturing Company having a leasehold interest in the property owned by appellee Stickney. A trial resulted in a verdict and judgment for damages to land taken, and for damages for the removal of buildings, and to the parts of the lots not taken, in part. Thus there is awarded the owners of the leasehold interest in lot 24, and the south six feet of lot 25, in Camp-subdivision, etc., and "for costs of removal from said lots, and for damages by interruption to the business, and the value of the improvements on said premises, and damages to the leasehold interest in the remainder of said lots not taken, to-wit, the south one hundred and twenty-

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Opinion of the Court.

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five feet of lots 21, 22, 23, 24, 25 and 26, in said subdivision, the total sum of \$5150;" and to the owner of the reversion, appellee Joseph A. Stickney, for his reversionary interest in the land taken, and for damages to the reversion in the south one hundred and twenty-five feet of lots 21, 22, 23, 24, 25 and 26, in said subdivision, except lot 24 and the south six feet of lot 25, and in full for damages to lots 19 and 20, and to that portion of lot 26 not included in said leasehold interest, and to lots 27 to 32, both inclusive, all in said subdivision, the gross sum of \$15,983; and to the owner, appellee William Ilett, of the south thirty feet of the north sixty-seven feet of lots 1, 2 and 3, in block 2, Reed's subdivision, etc., as compensation for land taken, and for damages to the remaining portion of said premises, to-wit, said lots 1, 2 and 3, the gross sum of \$16,465.

Numerous errors are assigned, but we shall find it necessary to consider only those questioning the correctness of the rulings of the court in giving and refusing instructions. No question is raised as to the correctness of the ruling of the court that as to the land taken for the proposed public improvement the owner was entitled to recover its full value for the purpose to which it was devoted or of which it was susceptible. The questions that we shall consider relate solely to the compensation to be awarded for damages to the part of the land or lots not taken.

By the eleventh and twelfth instructions given for respondents the jury were told:

11. "The jury are instructed, that if they find, from the evidence, that any of the respondents' property which is not taken will be damaged by reason of taking a part of their property and by the construction, maintenance and operation of the railroad, then the jury have no right to offset against such damages any benefits which may arise from the construction and operation of such railroad, unless the jury find, from the evidence, that such benefits are special to respondents,

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Opinion of the Court.

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property, and not shared by it in common with the generality of property in the vicinity of the line of said proposed railroad. Under the laws of this State no benefits or advantages which may accrue to the property not taken, in common with all other property along and near or in the vicinity of the line of the proposed railroad, by reason of the construction and operation of said railroad, can be lawfully set off or deducted from the damages, if any, to the property not taken.

12. "Even though the jury may believe, from the evidence, that some of the property of some of the respondents will be actually benefited by reason of the construction and operation of the petitioner's railroad, yet if the jury further believe, from the evidence, that such benefits are not special to the respondents' property, and are shared by it in common with the generality of property in the vicinity of the line of said proposed railroad, then such benefits are not to be considered in determining whether or not the property of said respondents not taken will be damaged by reason of taking a part of their property, and operating, constructing and maintaining the petitioner's railroad."

And the same was again said to the jury in the fourteenth, fifteenth, sixteenth and twenty-first, given on their behalf. The giving of these several instructions is assigned for error.

The misapprehension of counsel in drawing, and the court in giving, the instructions, consists in that they fail to draw the distinction between benefits that are special to the particular property not taken, and those benefits which, though not confined to the particular property, specially benefit it,—that is, specially add to its value. Property may be specially benefited by an improvement, and at the same time other property, upon the same improvement, be likewise specially benefited. This may be illustrated by the assessment of special benefits for a local improvement. Presumably all the property along the line of the improvement will be more or less specially benefited,—that is, benefited beyond the gen-

## Opinion of the Court.

eral benefit supposed to diffuse itself from the improvement throughout the municipality ordering the improvement made. If property is enhanced in value by reason of the improvement, as distinguished from the general benefits to the whole community at large, it is said to be specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may be, to a greater or less degree, likewise specially benefited. (*Wilson v. Board of Trustees*, 133 Ill. 443.) In other words, it is not such benefit as is special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but is such benefits as that the particular property is by the improvement enhanced in value,—that is, specially benefited. Hence, the language of the twelfth instruction, “yet if the jury further believe, from the evidence, that such benefits are *not special to the respondents’ property*, and are shared by it in common with the generality of property in the vicinity of the line of said proposed railroad, then such benefits are not to be considered,” etc., does not announce a correct rule of law. So in the use of the words “and shared by it in common with the generality of the property,” etc., there seems to be a confusion of ideas. If a piece of property is enhanced in value, such enhancement,—or, in other words, benefit to the property,—can not be said to be common to any other piece of property. Each piece of property especially enhanced in value is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows, necessarily, that where the benefits are designated as “general benefits,” “benefits common to other property,” and the like expressions to be found in decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits upon properties near it by an increase in their value, and at the

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Opinion of the Court.

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same time, by the convenience afforded the general public, confer a general benefit. So a railroad built through a town or through the country may be a general benefit, by affording additional facilities for travel and commerce, and thereby be of benefit to the community at large. But the effect of such general benefits upon any particular piece of property would be impossible of ascertainment, and speculative, and it has always been held that such benefits are not to be considered for that reason.

Keeping these distinctions in view in the further discussion, it will be found that the numerous cases in this State, perhaps with a single exception, are in line. While there is, perhaps, some confusion in the cases, it will be found that the measure of damages adopted in this State, as well as by the weight of authority elsewhere, is the difference in value of the property before the proposed construction and what it will be afterward. Hence, the effects flowing from the proposed work upon the particular property are to be considered, and if the value of the land not taken, considered as a part of the whole tract, or separately, is equal to its value before the improvement, there is no damage to property not taken. This will become apparent by a slight review of the law as announced in the various cases.

Under the Eminent Domain law of 1845, damages were not allowable where an additional value was given to the land from the proposed improvement, equal to the injury occasioned. In other words, the general benefits to the owner's property were allowed to be set off against the damages to his property by reason of the taking of a part thereof for the proposed improvement. Or, differently stated, in determining whether he was damaged, and the extent thereof, the general benefits to his property were to be considered. *Alton, etc. Railroad Co. v. Carpenter*, 14 Ill. 190; *Hayes v. Ottawa, etc. Railroad Co.* 54 id. 373; *Peoria, etc. Railway Co. v. Laurie*, 63 id. 264.

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Opinion of the Court.

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The act of 1852 provided for the appointment of commissioners, in condemnation proceedings, to fix compensation, etc. Section 5 of the act provided, that after being sworn, etc., the commissioners should proceed, without delay, upon view and inspection of the premises as well as upon hearing the allegations and proofs of the parties, to fix the compensation to be made to each party or owner of land to be taken, and also estimate and assess the damages sustained by any person or persons by reason of the construction and use of the work specified in the petition, taking into consideration and estimating the benefits and advantages to the parties resulting from the construction and use of the improvement: "*Provided, that said commissioners shall not estimate any benefits or advantages which may accrue to lands affected in common with adjoining lands on which such road or canal or other work does not pass.*" Under this statute, as under the present, compensation was required to be made for the full value of the land taken, without regard to benefits to the remaining land not taken. In assessing damages, however, to the remaining land of the owner not taken, only special benefits to the land not taken, and not common to adjoining land through which the improvement passed, could be set off. *Hayes v. Ottawa, etc. Railway Co. supra; Peoria, etc. Railway Co. v. Black, supra; Emerson v. Western Union Railway Co.* 75 Ill. 176.

The constitution of 1848 provided only that land should not be taken for public use without just compensation. This was a limitation upon the exercise of the sovereign power of eminent domain. But the people, through their representatives, had the undoubted right of imposing further limitations upon its exercise, and sought by the act of 1852 to provide compensation for damages, by reason of the proposed improvement, other than those arising from the loss of the land actually taken, and placed an express limitation in fixing the damages, excluding benefits common to adjoining lands over or through which the improvement did not pass.

## Opinion of the Court.

the constitution of 1870 it was provided that land should be taken or damaged for public use without just compensation, and the legislature, by the ninth section of the act of 10, 1872, which, as said in *Page et al. v. Chicago, Milwaukee and St. Paul Railway Co.* 70 Ill. 324, "is only for the carrying out of the provision of the constitution," after requiring a jury to go upon the premises, and from their view and evidence heard make their report setting forth and showing the compensation ascertained to each person entitled to, provided "that no benefits or advantages which may result to land or property affected shall be set off against or deducted from such compensation in any case," thereby regulating the act of 1852.

After the adoption of the constitution of 1870, and prior to the passage of the act of 1872, now in force, the case of *Chicago and Pacific Railway Co. v. Francis*, 70 Ill. 238, arose, and decided under the provision of the constitution before mentioned, and a construction was there placed upon the word "damaged," as used in the constitutional provision, and it decided: "We must presume that it was used in its ordinary popular sense, which is, hurt, injury, or loss. Now, we do not suppose that the framers of that instrument intended any other sense than loss or depreciation in the price of property damaged,—that the damage or injury should be real and not imaginary or speculative. It can not be said that a man has sustained damage when his property is worth and sold for as much as, or more than, if no road had been built. No damage to him if the construction of the railroad has increased the value of his lots, whilst it has added thirty, or fifty per cent to the value of other property in the neighborhood, but differently situated. He has no ownership in or to such appreciation in the value of property." And holding that the provision of the constitution must receive a reasonable construction, and showing that the construction contended for would be ruinous to corporations

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Opinion of the Court.

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seeking condemnation, it is said: "We must, therefore, hold that the damage contemplated by the constitution must be an actual diminution of present value or of price, caused by constructing the road, or a physical injury to the property that renders it less valuable in the market if offered for sale."

The next case, *Page et al. v. Chicago, Milwaukee and St. Paul Railway Co. supra*, arose after the passage of the act of 1872, and it was again held that the test of whether damages accrued to the land not taken was, whether there had been a diminution in the market value of the land by reason of the proposed improvement, and that the effect upon the whole tract remaining after part is taken must be considered. It was there insisted that the benefits to the land not taken could not, under the statute, be set off against damages, but it was held that the consideration of benefits by which the land was increased instead of being diminished in value, was not deducting benefits or advantages from the damages, "but it is ascertaining whether there be damages or not. It is but the estimation of damages, and seems to be the only fair and just mode of estimating them,"—citing *Mechem v. F. R. R. Co.* 4 Cush. 292; *Watson v. P. & C. R. R. Co.* 37 Pa. St. 469; *S. Nav. Co. v. Thoburn*, 7 S. & R. 410. And it was held: "If the market value of the tract will not be diminished by the construction and operation of the road, the land can not be said to be damaged thereby."

The next case was *Eberhardt v. Chicago, Milwaukee and St. Paul Railway Co.* 70 Ill. 347, and the question was as to the damages resulting to lands not taken, and it was said: "We had occasion to examine the question here arising \* \* \* in the case of *Chicago and Pacific Railway Co. v. Francis, supra*, in which the majority of the court held that, under the constitution and law, where land was not taken, but damaged, only, the question should be, 'Will the property be of less value when the road is constructed than it was when it was located?' If so, then the difference is the true measure of



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Opinion of the Court.

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ges." And an instruction that "as to lots not taken the will find as damages the depreciation in the market value same by reason of the construction and maintenance of railroad," was approved.

*Chicago and Pacific Railway Co. v. Stein et al.* 75 Ill. 41, was brought to recover damages sustained by the construction and maintenance of a bridge, its piers and protection across the north branch of the Chicago river. It is said: "If the erection of the bridge was an injury or damage to the premises, permanent in its character, and not as was shared by the public at large, then it was proper for the plaintiffs to establish the fact that the value of the premises had decreased by the erection of the bridge. In other words, it would have been proper to have shown how much the property would sell for in consequence of the erection of the bridge than if it had not been built."

The next case to which our attention is called is *Keithsburg Eastern Railroad Co. v. Henry*, 79 Ill. 290, which we shall have occasion to notice further on.

The case of *St. Louis, Vandalia and Terre Haute Railroad Co. v. Haller*, 82 Ill. 208, was predicated upon an ordinance of the town of Vandalia, and accepted by the railway company, in which it was provided that the company should be bound to pay all damages occasioned by the construction of the road to the property owners on the streets through which the road was permitted to run, and while the same rule was announced, it was placed entirely upon the provisions of the ordinance, and need not be here further noticed.

The next case in which the question was involved, was that of *City of Elgin v. Eaton*, 83 Ill. 535. That was an action by the city to recover damages to lots by reason of the change of grade of streets. After holding that the action lay, the court says: "The question then presents itself, what was the measure of damages? \* \* \* If the property is worth as much after the improvement as before, then

## Opinion of the Court.

there is no damage done the property. If the benefits received from making the improvement are equal to or greater than the loss, then the property is not damaged for public use. We apprehend there can be no 'damage' to property without a pecuniary loss. If there is no depreciation in value there is no damage, and if no injury then there shall be no recovery,"—citing *Chicago and Pacific Railway Co. v. Francis*, *supra*.

The same doctrine is announced and rule laid down in *Village of Hyde Park v. Dunham*, 85 Ill. 569, upon the authority of the cases before considered.

In *Chicago, Milwaukee and St. Paul Railway Co. v. Hall*, 90 Ill. 42, it was held that the damages to property not taken for public use must be real and not speculative, and must depreciate the price or its use, "and the depreciation is determined by comparing its value before and after the structure is made which produces the injury. Any benefits thus conferred should be considered, as well as injury inflicted by the structure, in estimating the damages,"—citing the *Francis*, *Page*, *Eaton* and other cases, in support of the rule.

In *St. Louis, Jerseyville and Springfield Railroad Co. v. Kirby*, 104 Ill. 347, an instruction saying to the jury, "that in estimating the damages to the balance of the farm through which the road ran, you should consider this railroad as running only through this farm, and should not consider any general benefits which the road might be in making a better market or convenience of travel," etc., was approved. There was no discussion of the question, and it is evident that the view taken was, that the instruction was proper, as excluding those general benefits which flow to the public generally, and not such as would appreciate the market value of the particular tract of land.

In *McReynolds et al. v. Burlington and Ohio River Railway Co.* 106 Ill. 152, the jury were instructed, that if, by the construction of the railway, the lands would be specially benefited to the extent, or greater than, they would be damaged, then

## Opinion of the Court.

ry should only find a verdict for the compensation for rip of land actually taken. It was insisted that this was ary to the provisions of section 9 of the Eminent Domain nd in the face of *Keithsburg and Eastern Railroad Co. v. , 79 Ill. 290*. The court, without referring to that case, any authority in this State or elsewhere, approved the ction. In so doing the court was in entire harmony ll of its former rulings, since the adoption of the pres- nstitution, except the *Henry case, supra*, and, as will be ater, in direct conflict with that case. The objection to nstruction noticed by the court was, that the "special ts" were not limited by the instruction to such as "were ommon to other property." It was then said, "special ts mean benefits not common to other property," and it isted that this is authority for the position that benefits ot be considered in estimating damages, where other rty may be likewise benefited. The attention of the was not called to the distinction here sought to be made, ie court did not attempt to determine the question, and btedly used the term "benefits common to other prop- as designating those benefits which flow to the public lly, as distinguished from those which enhance the value specific property, and without intending to exclude any nts arising from the improvement that tended to spe- ly enhance the value of the particular property.

*Dupuis v. Chicago and North Wisconsin Railway Co.* 115 , it was again expressly held, that, as to the land dam- out not taken, the measure of damages is the difference en its value before and after the proposed public im- nent, in that case the building of appellee's railroad,— in support the *Francis* and *Page cases, supra*.

*Chicago and Evanston Railroad Co. v. Blake*, 116 Ill. 163, ed to by counsel, as respects the question here involved, ecided upon the authority of *Page v. Chicago, Milwaukee t. Paul Railway Co. supra*, and, as understood by the

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Opinion of the Court.

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court, in accordance with the doctrine of that case. The language of the instruction, the giving of which was held not to be reversible error, "under the laws of this State no benefits or advantage which may accrue to lands or property in common with all other property along the line of the proposed railroad," by reason of its construction and operation, can be lawfully set off, etc., was understood to mean those benefits of a general nature which each tract of land or parcel of property along the line of railway shared in common, by reason of increased facilities for traffic and commerce, and the like, and which, while resulting in benefit to the community at large, are incapable of measurement or computation when applied to a particular tract of land.

In *Cemetery Association v. Minnesota and Northwestern Railroad Co.* 121 Ill. 199, the doctrine is again announced, that the market value of the land before and after the construction of the railroad furnishes the true criterion for determining the damages to lands damaged but not taken, and is in entire harmony with the *Page* and other cases, previously considered.

In *Chicago, Burlington and Northern Railroad Co. v. Bowman et al.* 122 Ill. 595, it was again held: "If the lands not taken would be depreciated in value by the construction and operation of the proposed railroad, the measure of damages would be the difference in their market value before the construction of the road and after its construction,"—citing the *Francis, Page, Eberhardt, Hall* and *Dupuis* cases.

In *Kiernan v. Chicago, Santa Fe and California Railroad Co.* 123 Ill. 188, an instruction saying to the jury, that "the decrease, if any, in the actual fair cash market value of the lands and property not taken, by reason of the construction and operation of the railroad, are the proper measure of damages and compensation which you are to ascertain in this case," was expressly approved.

*Harwood v. Bloomington*, 124 Ill. 48, was a proceeding by the city to condemn property for street purposes, under article 9

## Opinion of the Court.

Cities and Villages act. The court, after holding that land is taken for public improvement, the owner, under constitution and statute, is entitled to the value of the land fully taken, without regard to any supposed benefits that accrue from the improvement, (*Green v. Chicago*, 97 Ill. 110) say: "But where the owner interposes a claim for damages to that portion of the land not taken, in consequence of improvement, if the land not taken has received special benefits,—benefits not common to other property,—such benefits may be considered in arriving at the amount of damages the owner may have sustained to his property not taken." The court was not there called upon to define what were special benefits, or when benefits were "common to other property," and did not attempt to do so. The sense, however, in which the words were used in the opinion in that case is clearly indicated by the cases cited in support, among which are *Village of Hyde Park v. Dunham*, *City of Elgin v. Eaton*, *Chicago case*, and *McReynolds v. Railway Co. supra*. *Wabash, St. Louis and Pacific Railway Co. v. McDougall*, 111 Ill. 111, it was held that the measure of damages to the land not taken is the difference between the value of the land, whole, before and after the construction of the road built according to the plan proposed,—citing a number of the earlier cases before considered.

*Chicago, Peoria and St. Louis Railway Co. v. Aldrich*, 134 Ill. 111, is an instructive case. There an instruction was given to the jury, that in estimating the damages to the defendant's land not taken, they should consider the railroad running only through his farm, and should not consider general benefits which the road might occasion by making a better market or by affording convenience for travel, but that it would not be proper to take into consideration benefits as the defendant might enjoy in common with owners of other lands through which the road might run. The court said: "The general benefits arising from the

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Opinion of the Court.

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construction and operation of the road, and which the defendant will share in common with others, will grow out of the fact that the road is not limited in its effect to one locality, but is to connect and form a commercial highway between points distant from each other. The instruction to the jury to consider the road as running through the defendant's farm, was manifestly given for the purpose of eliminating from their minds all consideration of those general or commercial advantages which will flow to the public from the construction of the road, but which should in no way influence the assessment of damages." It was not necessary for the court there to determine what were special benefits, but the opinion clearly shows that by "benefits enjoyed in common with others," were meant those general and commercial advantages which flow to the public from the construction and operation of the road.

*Springer v. Chicago*, 135 Ill. 552, was a suit brought to recover damages alleged to have been caused by the construction of a bridge and viaduct, and approaches thereto, in one of the streets of Chicago. The court gave for the defendant instructions by which the jury were directed, that "if by the improvement, as a whole, the property is benefited as much as it is damaged by the construction, etc., alone, then there can be no recovery." It was said of this instruction, where an action is brought to recover damages where property is damaged by a public improvement only: "The law is well settled that a recovery can not be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before, no damage has been sustained and no recovery can be had." And again the *Eaton*, *Francis*, *Hall*, *Haller*, *Eberhardt* and *Page* cases are referred to as sustaining the position of the opinion. And this is again followed in *Chicago*, *Peoria* and *St. Louis Railway*

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Opinion of the Court.

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*Co. v. Eaton*, 136 Ill. 9, a condemnation case, and the like doctrine announced.

In the later case of *Washington Ice Co. v. Chicago*, 147 Ill. 327, also a condemnation case, it is said: "For land taken no benefits to lands not taken can be set off, but payment of the compensation for the damages accruing to the land not taken may be made in benefits to the property not common to the other property affected,—that is, the special benefits accruing to the particular property may be set off against the damages to the land not taken by the improvement, so that if the special benefits equal or exceed the damages, the owner can recover nothing as damages to property not taken; if less, he will recover the difference, only." As a matter of course, in using the language that special benefits may be set off against the damage done to the land, is meant, that in estimating the damages to the land not taken, the special benefits accruing to it from the improvement must be considered, so that if the benefits equal the damage which would otherwise be done, there is no damage and can be no recovery.

The case of *Keithsburg and Eastern Railway Co. v. Henry*, 79 Ill. 294, before referred to, announces a different rule, and can not be reconciled with the other cases to be found in this State. It is there held, that under the statute (act of 1872) the question of benefits can in no case be considered in estimating the value of land taken or in estimating the damages to land not taken. None of the cases previously decided, as before shown, (nor, indeed, is any other authority referred to,) sustain the doctrine of that case, and we have been unable to find any subsequent case in which it has been cited, except in *McReynolds v. Burlington and Ohio River Railway Co.* 106 Ill. 152, where it was referred to by counsel, as before shown, but it is not referred to in the opinion, and a holding contrary to it is made. There may be expressions in other cases seemingly inconsistent with the doctrine of the *Page case*, but when the opinions are considered in the light of what was then be-

## Opinion of the Court.

fore the court, as must always be done, they will be found not to be irreconcilable with the general doctrine.

By a practically unbroken line of decisions in this State it is well settled that the test, under the present statute, as to whether land not taken is damaged, is the effect of the improvement upon the value of the land. Under the rule, land is said to be damaged only when there is a diminution in its value,—a depreciation in its price or worth,—and the compensation required to be made is the amount of depreciation or diminution in value occasioned by the construction and operation of the railroad, or other improvement. Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause,—that is, also specially benefited by the improvement,—furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not, and if it has, the extent of the depreciation in value. (*Wilson v. Board of Trustees, supra*; *Bohm et al. v. Metropolitan Elevated Railway Co.* 129 N. Y. 576; *Rigney v. Chicago*, 102 Ill. 64.) On the one hand, the damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land, and such as are capable of measurement and computation. Hence, all imaginary and merely speculative damages or benefits are excluded from consideration. The consideration of such benefits as tend specifically to enhance the value of the particular property is not setting off benefits against the damage to the property, but is the simple ascertainment of whether the land has been in fact depreciated in price or worth,—that is, whether loss or damage has resulted to the owner,—for if his property is of the same value after as before the improvement he has sustained no loss. If he has lost nothing,—if his property has not been depreciated in price



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Opinion of the Court.

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or value,—it is not damaged, within the meaning of the constitution, and there can be no recovery. There can be no damage to property without pecuniary loss or injury which lessens its value.

It therefore follows that every element arising from the construction and operation of the railroad or other public improvement, which, in an appreciable degree, capable of ascertainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it. Thus, the situation of the property, the use to which it is devoted and of which it is susceptible, the character and extent of the business to which it is adapted, before and after the construction of the public work, and, indeed, every fact and circumstance legitimately tending to show a depreciation or enhancement of the value of the property, are proper to be considered, so far as they tend to show the actual value of the land without and with the proposed taking for the public use, while, on the other hand, a consideration of facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which, in determining the injury or benefit to the particular tract of land, can not be other than conjectural and speculative, is excluded.

We need not pursue the discussion. It is apparent, as before stated, the real question to be determined is the value of the land not taken, at the time of filing the petition for condemnation, with and without the improvement. (*South Park Comrs. v. Dunlevy*, 91 Ill. 49; *Cemetery Ass. v. Railroad Co.* 121 id. 205.) Other cases in this State, among which may be mentioned *Shawneetown v. Mason et al.* 82 Ill. 337, and *Rigney v. Chicago*, 102 id. 64, amply support the views here expressed. See, also, *City of Atlanta v. Green*, 67 Ga.

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Opinion of the Court.

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86; *Same v. Word*, 73 id. 276; *Newman v. Railway Co.* 118 N. Y. 618; *Bohm et al. v. Metropolitan Elevated Railway Co.* 129 id. 576.

Nor can it be said that the error in giving the instructions indicated, was cured by other instructions in the case. It is true, the jury, by the third instruction, were told that "just compensation means the payment of such sums of money to the owners of property proposed to be taken or damaged as will make them whole, so that, on receipt by such owners of the compensation and damages awarded, they will not be poorer by reason of their property being so taken or damaged." That this is an accurate statement of the law is not questioned. But it was immediately followed by the eleventh, twelfth, fourteenth, sixteenth, twenty-first, and other instructions, in which the jury were specifically told that in arriving at the compensation they must exclude from their minds, and had no right to take into consideration, or to offset against any damages which may be sustained, any benefits or advantages which may accrue to said property in common with other property in the vicinity of the line of the proposed railroad, by reason of its construction and operation. The jury would understand from these instructions, that in determining the compensation to be paid for land not taken, all benefits to the particular property, where like benefits were conferred upon other property in the vicinity by the construction of the railroad, must be excluded from their consideration, although such benefits might materially enhance the value of appellees' lots, even to an extent that would show there was no depreciation therein by reason of the building of the railroad, and would award compensation upon that basis.

In respect of the second instruction given for appellees, without quoting it, it should be said, that the jury have little to do with the theory and policy of the law, and instructions should be so drawn as to be a concise and accurate statement of the law as applicable to the facts of the particular case.

## Syllabus.

While the giving of this instruction would, perhaps, not be prejudicial error, it was improper, as bringing to the attention of the jury, in an argumentative form, matters with which they had no immediate concern.

For the error in giving the instructions before indicated, the judgments in the several cases involved in this appeal are reversed and the causes remanded.

*Judgment reversed.*

Mr. JUSTICE MAGRUDER, dissenting.

DAVID SMITH

v.

THE COMMISSIONERS OF HIGHWAYS *et al.*

*Filed at Springfield April 2, 1894.*

1. **HIGHWAY**—*laying out a road—meeting to hear objections.* A meeting of the commissioners of highways on a petition to lay out a road was appointed to convene at the west end of the proposed road, to examine the route of the same and hear reasons for or against laying out the road. Record of this meeting was indorsed on the petition, as follows: "February 10, 1893.—Commissioners met at the beginning of the road mentioned within, at ten o'clock A. M., and walked over said road to the east end, and then, after hearing reasons for and against the location of said road, granted the prayer of the petition:" *Held*, that the record showed, with sufficient clearness, that the commissioners did, in fact, meet at the west end of the road.

2. In such case it was wholly immaterial whether the hearing of reasons for and against the laying out of the road was had at the west end before, or at the east end after, the commissioners had viewed the route. Such meeting was one continuous proceeding.

3. **SAME**—*presenting a second petition to lay out a road.* The fact that the commissioners of highways may have refused a petition for the laying out of a road is no bar to the presentation of a second petition for the same purpose. Section 48, which prohibits the filing of a second petition within two years, relates only to cases where an order has been granted for laying out the road, and damages are assessed, and the commissioners, or, in case of an appeal, the supervisors,

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150	385
61a	428
150	385
108	430
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109	505

150	385
185	207

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Brief for the Plaintiff in Error.

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are of opinion that the damages assessed are too high, so as to be an unreasonable burden upon the tax-payers.

4. *CERTIORARI—when and for what it lies.* The common law writ of *certiorari* may be awarded to all inferior tribunals and jurisdictions, when it appears that they have exceeded the limits of their jurisdiction, as, in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing the proceedings.

5. *SAME—purpose—mode of trial—judgment.* The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court, to determine whether the former had jurisdiction, or has exceeded its jurisdiction, or has failed to proceed according to the essential requirements of the law. The trial is solely by inspection of the record, no inquiry as to any matter not appearing by the record being permissible; and if the want of jurisdiction or illegality appears by the record, the proper judgment is that the record be quashed.

6. *SAME—when not the proper remedy—matters considered.* Where the controversy involves the investigation of facts not appearing in the record, *certiorari* is not the proper remedy. When brought to test the legality of proceedings to lay out a highway, a former proceeding for the laying out of a road over the same route is not a part of the record sought to be reviewed, and can not be considered.

WRIT OF ERROR to the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Mr. CHARLES M. PEIRCE, for the plaintiff in error:

The commissioners of highways are purely creatures of the statute, and have no power outside of that conferred upon them by the statute. *Brauns v. Town of Peoria*, 82 Ill. 11.

The commissioners of highways are bound to give notice of the time and place for hearing reasons for and against laying out the road, and for a failure to comply with this they lose jurisdiction. *Starr & Curtis' Stat. chap. 121, sec. 33; Frizell v. Rogers*, 82 Ill. 109.

It is made the duty of the commissioners, by the statute, to meet at the time and place, and, if necessary, to adjourn from time to time, or from one place to another, by making public announcement and by posting notices. *Starr & Curtis' Stat. chap. 121, sec. 34.*

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Brief for the Defendants in Error.

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failure to comply with any or all requirements of the the commissioners lose jurisdiction. *Comrs. of High-Harper*, 38 Ill. 104; *Comrs. of Highways v. Hoblit*, 19 259; *Frizell v. Rogers*, 82 Ill. 109; *Wood v. Comrs. of ys*, 62 id. 391.

can be no consideration of the petition for the laying new road beginning and ending at the same place, he statutory limitation of two years. *Starr & Curtis'* ap. 121, sec. 48.

It is contended in this case that the latter point made allant is inapplicable, for the reason that the road or in the petition of December 10, 1892, and the one petition under which this proceeding is had a few days are of different widths. But it will be admitted that road to be laid out by each of the said petitions was and end at the same point, and in all other respects road was to be the same, except the variation of a in width. This we deem will not avoid the statute on t, as it has been held repeatedly that the beginning minus of the road determine whether it is the same not. *Starr & Curtis' Stat. sec. 48, supra*; *Ford v. ,* 44 N. H. 388; *Haines on Township Organization,* e 5; *Shinkle v. Magill*, 58 Ill. 422.

WEN T. REEVES, for the defendants in error :

commissioners met at the place and at the time fixed notice, and after meeting at that place, where all per- iring to present reasons for or against the location of were required to be present, the commissioners, and bly those sufficiently interested to be present, walked line of the proposed road, three-quarters of a mile, the line, as the commissioners were required by the o do, and then, when they had reached the east end roposed road, they heard the reasons for and against tion, as the record recites.

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Opinion of the Court.

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The inhibitory provisions of section 48, chapter 121, of the Revised Statutes, (Starr & Curtis,) only apply to a case where, in the course of the proceedings in relation to a road, there has been an assessment of damages made by a jury, either while the case is before the commissioners or on appeal to supervisors, and the commissioners in the one case, and the supervisors in the other, shall be of opinion the damages so assessed by the jury are manifestly too high, and the payment of the same would be an unreasonable burden upon the taxpayers of the town, and being of this opinion, the commissioners, or the supervisors, as the case may be, have, by a written order, revoked all proceedings in the case and filed a copy of such order in the town clerk's office, then no other proceedings shall be had by the commissioners of highways, nor any petition entertained in regard to the same road, for two years from the date of filing such order of revocation.

MR. JUSTICE BAILEY delivered the opinion of the Court:

This was a common law writ of certiorari, issued by the Circuit Court of McLean county, to review certain proceedings in relation to laying out a new road in Hudson township in that county. It appears from the return made by the commissioners of highways, and by the justice of the peace before whom the certificate of the determination of the commissioners to lay out the new road had been filed for the purpose of obtaining a jury for the assessment of damages, that a petition dated December 30, 1892, asking that a new road of the width of fifty feet be laid out over a prescribed route between two designated points, signed by the requisite number of land owners residing within two miles of the road to be laid out, was presented to the commissioners of highways; that at a meeting of the commissioners held January 28, 1893, the petition was received and an order entered thereon appointing a meeting to be held at the west end of the proposed road on

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Opinion of the Court.

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February 10, 1893, for the purpose of going over the road, and of hearing reasons for and against laying out the same, and directing that notices of such meeting be posted, and notices of such meeting were thereupon drawn up and signed by the commissioners, reciting the presentation of the petition and giving notice that the commissioners had fixed upon February 10, 1893, at the hour of ten o'clock in the forenoon, at or near the residence of William Morrow, at the west end of the proposed route, as the time and place of their meeting to examine the route of the proposed road, and to hear reasons for or against laying out the same, when and where all persons interested could be heard; that five copies of this notice were duly posted up in five public places in the township ten days prior to the day appointed for the meeting.

It then appears from the order indorsed by the commissioners on the petition at the meeting thus appointed, as follows: "February 10, 1893. Commissioners met at the beginning of the road mentioned within, at 10 o'clock, A. M., and walked over said road to the east end, and there, after hearing reasons for and against location of said road, unanimously declared in favor of granting prayer of petitioners, and adjourned."

The first point made is, that the meeting of the commissioners at which reasons for or against laying out the road were heard, was held at the east end of the road instead of the west end, as appointed and advertised, and that the plaintiff in error and others were thereby deprived of an opportunity to be present and be heard in opposition to laying out the road, and that by holding the meeting at a place different from the one appointed, the commissioners lost jurisdiction of the proceeding. We think that the point thus raised is without substantial foundation in fact. The meeting was appointed to convene at the west end of the proposed road, at 10 o'clock, A. M., of February 10, 1893, and its purpose was, to go over the road and view the proposed route, and hear reasons for and against laying out the road. The record shows

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Opinion of the Court.

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with sufficient clearness, that the commissioners did in fact meet at the time and place appointed. The place of meeting, it is true, is described in the order as at the beginning of the road. This description doubtless would, of itself, be ambiguous, but as the order recites that, after convening, they walked over the road to the east end, it is sufficiently plain that the place of meeting was at the west end. The fact that the commissioners, after meeting at the time and place appointed, and of course after all who desired to be there at that time had had an opportunity to assemble, walked over the road to the other end, and after viewing the route, heard reasons for or against laying out the road, deprived no one interested of a hearing, and was not an irregularity which had any tendency to deprive the commissioners of jurisdiction. The very purpose of the meeting was to go over the route of the proposed road, and after those who desired to be heard upon the question of the propriety of laying it out had assembled or had an opportunity to assemble at the place appointed for the meeting, it was wholly immaterial whether the hearing of reasons for and against the laying out of the road was had at the west end before, or at the east end after, the commissioners had viewed the route. The meeting was one continuous proceeding, and so far as the record discloses, it was conducted in all respects in a proper manner.

The only other point urged by counsel is, that a former petition for laying out a new road over the same route and with the same termini, having been denied by the commissioners of highways within two years, the commissioners were precluded, by the provisions of section 48, of chapter 121, of the Revised Statutes, from entertaining or granting the present petition.

The fact that a former petition had been denied in no way appears in the record brought up for review by the writ of certiorari and we know of no rule which permits the investigation, by means of this writ, of facts not appearing upon



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Opinion of the Court.

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cord. It has been repeatedly held by this court, that upon law writ of certiorari may be awarded to all inferior tribunals and jurisdictions where it appears that they have exceeded the limits of their jurisdictions, or in cases where they have proceeded illegally, and no appeal is allowed, no other mode is provided for reviewing their proceedings. The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law. The trial is solely by inspection of the record, no inquiry as to any matter not appearing by the record being permissible, and if the want of jurisdiction or error appears by the record, the proper judgment is that the writ should be quashed. But where the controversy involves investigation of facts not appearing upon the record, certiorari is not the proper remedy. *Commissioners of Drainage v. Griffin*, 134 Ill. 330, and authorities there cited.

Nothing is properly brought before the court by the introduction of evidence outside of the proceedings under the petition in pursuance of which the road in question was ordered to be laid out. A former proceeding, though it may have been for laying out a road over the same route, is not a part of the record thus brought before the court to be reviewed, nor is such former proceeding in any way alluded to in the record brought up by the petition. Such former proceeding is brought before the court by the introduction of evidence *dehors* the record, and upon well established rules, is inadmissible in cases of this character.

We assume, however, that at the hearing in the Circuit Court, the record of the proceedings under the former petition was introduced in evidence without objection, or indeed by the consent of counsel, and while its admission was irregular, we are disposed to consider the case as though the facts disclosed were properly before us. It appears from the

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Opinion of the Court.

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evidence thus admitted that a petition, dated July 22, 1892, and signed by the requisite number of property-owners, asking for the laying out of a new road sixty feet in width over the same route, was presented to the commissioners, and that such proceedings were thereupon had thereon, that an order was entered by the commissioners under date of December 10, 1892, denying such petition, such order being entered at the meeting appointed by the commissioners to hear reasons for and against laying out the road. The question is thus presented whether section 48 of the Road Law has any application to a case of this character. That section is as follows: "In cases where the damages are not wholly released or agreed upon, and the commissioners in case no appeal has been taken, and the supervisors in case an appeal is taken, shall be of opinion that the damages assessed by the jury are manifestly too high, and that the payment of the same would be an unreasonable burden upon the tax-payers of the town, the commissioners or the supervisors who heard the appeal, as the case may be, may revoke all proceedings had upon the petition, by a written order to that effect, and such revocation shall have the effect to annul all such proceedings and assessments, releases and agreements, in respect to damages growing out of the proceedings upon the petition: *Provided*, upon the final determination of the commissioners of highways, or the supervisors, upon appeal, being determined, and a copy of all such proceedings being filed in the town clerk's office, no other proceedings shall be had by the commissioners of highways, nor any petition entertained in regard to the same road or petition, for two years from the date of filing such copies of proceedings; and after two trials as aforesaid, if the decision be the same, no other petition shall be entertained for the same until the expiration of three years from the filing of the last proceeding."

It is plain that this section relates only to cases where an order has been entered granting the petition for laying out the

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Opinion of the Court.

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road, and damages are assessed in the mode pointed out by the statute, and the commissioners, or in case of an appeal, the supervisors, are of the opinion that the damages assessed are too high, so as to be an unreasonable burden upon the tax-payers. In such case, authority is given to the commissioners, or to the supervisors in case of an appeal, to revoke and annul all proceedings had upon that petition, and when that is done, it is provided that no other petition shall be entertained in regard to the same road for two years thereafter. This doubtless was intended to prevent repeated assessments of damages, with power on the part of the commissioners to set them aside, until one could be procured low enough to satisfy them. It is easy to see that an unrestricted power on the part of the commissioners in that respect might be liable to great abuse, and be made the instrument of oppression, and therefore doubtless it was provided that where it had been once exercised, it should not be exercised again within the period of two years. But it is very clear that the section can have no reference to cases where no damages have been assessed, but the action of the commissioners has been, as in this case, to simply deny the petition for laying out a road. In such case, we know of no statute and are referred to none which prohibits the repeated presentation to the commissioners of petitions for laying out the same road.

At the hearing, the Circuit Court held that no ground was shown for setting aside the proceedings sought to be reviewed, and entered an order quashing the writ of certiorari, and in that result we are disposed to concur. The judgment will therefore be affirmed.

*Judgment affirmed.*

## Syllabus. Opinion of the Court.

LOUISVILLE, EVANSVILLE AND ST. LOUIS CONSOLIDATED R. R. Co.

v.

CLARA SURWALD, Admx.

*Filed at Mt. Vernon June 19, 1894.*

1. APPEALS AND WRITS OF ERROR—who may prosecute. One not a party to a decree, authorizing an administrator to sell lands to pay debts of the intestate, and who is not shown in any way to have any interest in the subject matter of the litigation, can not maintain an appeal or writ of error to reverse the decree.

2. It is a familiar rule that a party can not complain of a judgment or decree which does not affect him or his property in some manner. As a general rule, a writ of error should be sued out in the same names in which the proceedings in the circuit or trial court were conducted.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. B. R. BURROUGHS, Judge, presiding.

MESSRS. G. & G. A. KOERNER, for the plaintiff in error.

MR. CHARLES W. THOMAS, for the defendant in error.

MR. JUSTICE CRAIG delivered the opinion of the Court:

On a petition for leave to sell real estate, in the case of Clara Surwald, administratrix of the estate of Frederick Surwald, deceased, against the Illinois and St. Louis Railroad and Coal Company and the East St. Louis Elevator Company, the circuit court of St. Clair county entered a decree directing a sale of real estate to pay debts. To reverse that decree the Louisville, Evansville and St. Louis Consolidated Railroad Company appealed to the Appellate Court. In that court, on the motion of appellee, the appeal was dismissed, on the ground that appellant was not a party to the action in the circuit court. In order to reverse the judgment of the Appel-

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Opinion of the Court.

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court the Louisville, Evansville and St. Louis Consolidated Railroad Company sued out this writ of error.

appellant was not a party to the petition to sell real , nor was any decree rendered against it, and so far as rs from the record it has no interest whatever in the t matter of that litigation. Under such circumstances receive no ground upon which the plaintiff in error here maintain an appeal in the Appellate Court. It is a ar rule that a party can not complain of a judgment or which does not affect him or his property in some er. As a general rule, a writ of error should be sued the same names in which the proceedings in the circuit were conducted. *Robson v. Magenly*, 28 Ill. 426.

s, however, suggested in the argument, that since the eding was commenced to sell lands, by the administrahe Illinois and St. Louis Railroad and Coal Company, the defendants in that proceeding, has become merged, solidation, with the Louisville, Evansville and St. Louis lidated Railroad Company. But there is nothing in the to show that fact, and, as was held on appeal between me parties, (147 Ill. 194,) a mere suggestion is not suf- to make the appellant a party so as to entitle it to l'or sue out a writ of error. As the appellant was not y to the action, and did not appear to have any interest subject matter of the suit, we do not think it had any o maintain an appeal to review the decree of the circuit

judgment of the Appellate Court dismissing the appeal s affirmed.

*Judgment affirmed.*

## THE WEST CHICAGO RAILROAD COMPANY

v.

JUERGEN BODE.

*Filed at Ottawa June 19, 1894.*

1. **AMOUNT OF DAMAGES**—*a question of fact.* The amount of damages sustained by the plaintiff in an action at law is a question of fact, which is not open for consideration in this court.

2. **FORMER DECISIONS**—*excessive damages.* The ruling of this court in *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183, and *Chicago and Northwestern Railway Co. v. Jackson*, 55 id. 492, holding that this court might pass upon the fact whether the damages awarded are excessive, was made before the passage of the statute making the finding of facts by the Appellate Court conclusive upon this court.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

Mr. WILLIAM B. KEEP, for the appellant.

Mr. JOHN C. RICHBERG, for the appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is an action on the case, brought by the appellee against the appellant company to recover damages for personal injuries, sustained by the appellee in a collision between two of appellant's trains in the Washington Street tunnel, in the city of Chicago, on the twentieth day of May, A. D. 1891, while appellee was a passenger upon one of said trains. The jury returned a verdict for \$12,500.00. Motion for new trial was overruled, and judgment was rendered upon the verdict. The judgment having been affirmed by the Appellate Court, the present appeal is prosecuted from such judgment of affirmance.

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Opinion of the Court.

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s not claimed, that any error was committed by the trial in the admission or exclusion of evidence, or in the giving or refusal of instructions. There is no controversy as to the ability of the appellant for the damages sustained by him; but a reversal of the judgment is asked solely upon the ground, that the damages as assessed by the jury are excessive. We have repeatedly held, that the question as to the amount of the damages is one which we cannot enquire into. *Palace Car Co. v. Bluhm*, 109 Ill. 20; *Beefer v. Webb*, 111 Ill. 436; *C. & E. R. R. Co. v. Holland*, 122 id. 461; *City of Joliet v. Weston*, 123 id. 641; *Stumer v. Pitchman*, 124 id. 641; *J., A. & N. Ry. Co. v. Velie*, 140 id. 59). The amount of damages sustained by the plaintiff in an action at law is a question of fact, which is not open for consideration by the court, under the statute. (*City of Joliet v. Weston*, *supra*). Counsel for appellant calls our attention to the cases of *Ill. R. R. Co. v. Welch*, 52 Ill. 183, and *C. & N. W. R. R. Co. v. Jackson*, 55 id. 492, where judgments were reversed by this court, because the verdicts, upon which they were based, awarded excessive damages. Those cases were decided under the statute made the finding of facts by the Appellate Court conclusive upon this Court, and, therefore, have no application here. (2 Starr & Cur. Ann. Stat. page 1851, and there referred to under section 89 of the Practice Act). Counsel are asked by counsel for appellee to require the appellant to pay, in addition to the costs, ten per cent. upon the amount of the judgment as damages, upon the alleged ground that the appellant at the present appeal has been prosecuted for delay. We are so clearly of opinion, that the prosecution of the appeal has been for the purpose of delay, as to feel justified in awarding ten per cent. damages. No order will be entered requiring the payment of the same.

judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## Syllabus.

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157	470
150	398
107a	231

JOE H. DAWSON *et al.*

v.

E. D. VICKERY.

*Filed at Mt. Vernon June 19, 1894.*

1. **FRAUD**—*setting aside deed obtained by fraud.* Where the consideration of a deed for land is the sale of a stallion, which was represented by the seller to be about the age of eleven years and a sure foal-getter, when, in truth, such horse was more than nineteen years old and entirely worthless as a foal-getter, and of no value for any purpose, and the purchaser, on learning that the horse was worthless, notified the seller that the horse was subject to his order, it was held, that a court of equity would set aside the deed for the fraud of the grantee, and that the deed was without consideration.

2. **SAME**—*damages recoverable on rescinding sale for fraud.* The buyer of chattel property which proves to be worthless has not the right to keep it an indefinite time after discovering the fraud practiced on him, and recover from the seller the expense of taking care of it. For such a breach of a contract the buyer must act with reasonable promptness, and can only recover such damages as he thereby sustains.

3. A decree found that the sale of a stallion was effected by false and fraudulent representations of the seller as to the age and qualities of the animal, which was entirely worthless, and that the buyer, immediately on learning that the horse was worthless, notified the seller that the horse was at the purchaser's stable subject to the seller's order, and that the latter refused to take it away, and the buyer kept such horse from May 10, 1889, to July 10, 1890, and that the care and expense of keeping the animal for such period was reasonably worth \$222.50, which the seller was decreed to pay the buyer: *Held*, that the decree as to the damages required to be paid by the seller was erroneous, and not sustained by the facts found therein.

4. **CROSS-BILL**—*whether germane to the original bill.* On bill to foreclose a mortgage, in which a subsequent purchaser of the premises is made a party defendant, a cross-bill by the mortgagor, seeking to have his conveyance to the defendant set aside on the ground of fraud and failure of consideration, is proper, for the purpose of determining who has the right of redemption.

5. While it is true that a cross-bill must relate to the subject matter of the original bill, it is not essential that the facts showing the relief sought by one defendant against another should appear from the original bill.



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Briefs of Counsel.

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6. *LACHES*—*must be pleaded*. A defendant can not assign for error the failure of the court to dismiss a bill on the ground of *laches*, when no such defense has been set up in the court below by plea or answer.

7. *CHANCERY*—*preserving the evidence*. Where no certificate of evidence and no bill of exceptions are preserved in the record of a chancery suit, this court will be confined to the finding of facts in the decree alone.

WRIT OF ERROR to the Circuit Court of Clay county; the Hon. WILLIAM C. JONES, Judge, presiding.

Mr. J. R. EDEN, and Mr. W. G. COCHRAN, for the plaintiffs in error:

A cross-bill is a bill by a defendant in a chancery suit against the plaintiff in the same suit, or against other defendants in the same suit, touching the matter in question in the original bill, and is usually brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain fuller relief to all the parties touching the matter of the original bill. *Kennedy v. Kennedy*, 66 Ill. 190; *Gage v. Mayer*, 117 id. 632; *Thompson v. Shoemaker*, 68 id. 256.

By dealing with the property as his own, after discovering the alleged fraud, Vickery is precluded from rescinding the contract. *Bishop on Contracts*, sec. 683; *Jennings v. Gage*, 13 Ill. 610.

Mr. B. D. MONROE, for the defendant in error:

One who has perfected his right to rescind a fraudulent contract can not lose it by merely taking care of the property received, unless what he does is done with the intent to confirm the contract.

Where subsequent acts are relied upon as a defense, in a case where fraud is clearly established, it is said the acts must stand upon the clearest evidence, and must evince a purpose to waive or forgive the fraud, and must amount to a clear election not to rescind.

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Opinion of the Court.

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The jurisdiction of courts of equity to rescind contracts for fraud is well established. Pomeroy's Eq. Jur. secs. 110, 112; *Henshaw v. Bryant*, 4 Scam. 97; *Wing v. Sherrer*, 77 Ill. 200.

Mr. JUSTICE BAKER delivered the opinion of the Court:

To the March term, 1890, of the circuit court of Clay county, J. M. and J. R. Tanner filed their bill in chancery against E. D. Vickery, and Kate Vickery, his wife, to foreclose a mortgage on the south-west quarter of the south-east quarter of section 12, township 4, north, range 7, east of the third principal meridian, alleged to have been executed by said Vickery and wife on the 12th day of March, 1888, to secure the payment of a promissory note of that date for \$225. Joe H. Dawson and Joe Britton, plaintiffs in error, were also made defendants, with the allegation that they claimed some interest in the land, which, if any, was subject to the mortgage of complainants. They answered the bill, setting up that E. D. Vickery and wife, on the 9th of April, 1889, had conveyed the lands to them by warranty deed, which was duly recorded in the recorder's office of Clay county two days thereafter; that the mortgage mentioned in complainants' bill also conveyed an eighty-acre tract of land, which the complainants, with full knowledge of the rights of plaintiffs in error in said forty acres, had released, and alleging that the said eighty-acre tract should be first exhausted in the satisfaction of complainants' mortgage debt, and the said forty acres released therefrom. They also filed a cross-bill against complainants in the original bill and E. D. Vickery and wife, alleging the facts set up in the answer, and praying the same relief. To this cross-bill a demurrer was sustained, and the complainants therein elected to stand by the cross-bill.

E. D. Vickery answered the original bill, admitting the facts therein alleged, and filed a cross-bill against plaintiffs in error, setting up that he had conveyed the land to them in exchange for a stallion, upon their false and fraudulent representations

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Opinion of the Court.

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stallion was a sure foal-getter and not over eleven  
l, when, in truth, he was over twenty years old, and  
; that immediately upon learning these facts he had  
them of the same, and also notified them that the  
s subject to their order, but they had refused to take  
at they well knew of the worthless character of the  
en they made such representations to him; and that  
, by reason of his age and impotency, was wholly  
s. It also alleged that the keeping of the horse was  
ly worth three dollars per week; etc. The prayer of  
a-bill was, that the said deed from the complainants  
to said Dawson and Britton, be set aside and can-  
d for an accounting as to damages, etc.

iffs in error answered, admitting that the sale of a  
was the consideration for the conveyance of the land  
but denying that he was not as represented by them,  
ring that he was a valuable horse, etc.

the hearing, the court entered a decree of foreclosure  
iginal bill as therein prayed, dismissed the cross-bill  
iffs in error, but found the cross-bill of said Vickery  
e, finding and setting forth in the decree the follow-  
: "That on the 9th day of April, A. D. 1889, said  
skery and wife, Kate, conveyed, by warranty deed,  
on and Britton, defendants in said cross-bill, said  
st quarter of south-east quarter of section 12, afore-  
ch deed was properly acknowledged, and recorded in  
1 of deed records, at page 360, in the recorder's office  
ounty, the express consideration of said deed being  
t the real consideration was the sale and delivery by  
rson and Britton, to said Vickery, of one Clydesdale  
named 'Border Chieftain, No. 87,' of the American  
k, valued by said parties at the sum of \$800. And  
further finds, that defendants Dawson and Britton  
ted to said Vickery that said horse was about eleven  
, etc., and a sure foal-getter; that said Vickery, rely-  
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Opinion of the Court.

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ing upon said representations, and believing them to be true, executed and delivered said deed to said Dawson and Britton for said premises in payment for said horse, when, in truth and in fact, said horse was more than nineteen years old, and was entirely worthless as a doer and foal-getter, and of no value for any purpose; that the said Dawson and Britton made the said representations knowing them to be false at the time, and for the purpose of misleading said Vickery, and cheating him out of his said real estate by reason of said false and fraudulent representations, as aforesaid, and that said deed by Vickery and wife, having been made and delivered to said Dawson and Britton upon such false and fraudulent representations, is without consideration, and ought to be canceled on the record and the title to said premises vested in Vickery, subject to said mortgage of Tanner Bros. And the court further finds, that said Vickery, immediately on learning that said horse was worthless for stud purposes, notified said Dawson and Britton of such fact, and that said horse was at his stable subject to their order, and that said Dawson and Britton refused and failed to take said horse away or to cancel said deed; that said Vickery kept said horse from the 10th day of May, 1889, until the 10th day of July, 1890, when he died; that the care and expense of keeping said horse for said period is reasonably worth \$222.50." It was then ordered and decreed that said deed be set aside and canceled, and the court rendered a judgment in favor of said E. D. Vickery upon his cross-bill, and against Joe H. Dawson and Joe Britton, for \$222.50 damages, and awarded execution therefor.

Dawson and Britton alone prosecute this writ of error, to which complainants in the original bill are not made parties. The only questions, therefore, which can be raised here, are such as arise upon the cross-bill of Vickery, and the answer thereto of plaintiffs in error, and those questions are, did the circuit court err in setting aside said deed and in rendering said judgment for damages.

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Opinion of the Court.

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rst contended that the cross-bill of Vickery was not to the original bill, and therefore no relief could be granted under it. The object of this cross-bill was to determine who had the equity of redemption in the premises described in the original bill. It may be that the complainants in the original bill had no interest in that question, but it does not follow that the cross-bill is not germane to the original bill. (*Chicago Artesian v. Connecticut Mutual Life Ins. Co. et al.* 57 Ill. 424; *al. v. Case*, 32 id. 45.) The equity of redemption is a question pertinent to the relief sought by the original bill, these parties to the cross-bill being proper parties interested in that question, we are unable to see why the objection between them was not the proper subject matter of the cross-bill. While it is true that a cross-bill must relate to the subject matter of the original bill, it is not essential that facts showing the relief sought by one defendant against another should appear from the original bill. *Robins v. ...*, 68 Ill. 197.

al for plaintiffs in error insist in their argument that the cross-bill should have been dismissed on the ground of the objection of the complainant therein. A sufficient answer to this objection is, no such defense was set up in the court below, and no answer.

so contended that the decree was not authorized by the court. In passing upon this point we are confined to the facts in the decree alone, there being no certificate of error or bill of exceptions in the record. The evidence was taken in open court. It will need no argument to show that the finding of facts in the decree above set forth, no other result could have been reached than that announced by the court, in so far as it sets aside the deed in question. As there found, the deed was obtained by the false and fraudulent representations set forth, it would be a travesty on justice for a court of equity to refuse to declare it

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Opinion of the Court.

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null and void. If the facts therein recited are accepted as true, as they must be, the deed was obtained by willful misrepresentation and fraud, and wholly without consideration. It is found by the decree that the representations as to the age and qualities of the horse were not only false, but known to be so by plaintiffs in error, and that upon the discovery of the fraud by Vickery, and an offer on his part to return the property, they refused to accept it or to reconvey the land which they had so fraudulently obtained. We are at a loss to perceive what more could be required of the buyer of chattel property than was done by Vickery in this case, to give him a standing in a court of equity. On the record presented to us we entertain no doubt as to the correctness of the decree setting aside the deed.

On the other branch of the decree we think the law is with the plaintiffs in error. The jurisdiction of a court of equity to adjust damages between parties in a case like that set up in the cross-bill of defendant in error could only be maintained upon the ground that, having taken jurisdiction for the purpose of determining the validity of the title to the land, it would settle all the rights of the parties growing out of the transaction. Even conceding that the jurisdiction can be sustained on that theory, it must be admitted that only such damages could properly be allowed as could have been recovered in an action at law on the facts alleged. No one will contend that the buyer of chattel property which proves to be worthless has a right to keep it an indefinite time after discovering the fraud, and recover from the seller the expense of taking care of it. For such a breach of contract he must act with reasonable promptness, and can only recover such damages as he sustains by so doing. The only facts alleged in the bill upon which to base this money judgment are, "that on the 15th of April he wrote defendants the facts, and desired them to come and take the horse away, and on the 16th defendant Dawson wrote refusing to take back the horse; that since

## Syllabus.

horse has been kept by your complainant, and that onably worth \$3.50 per week to keep said horse;” rayer as to that branch of the case is, that “an ac- 7 be taken of the amount of loss sustained by your account of the failure of the horse to do stud service, ed, etc.; that judgment be rendered in favor of your such sum so found due, and that execution issue for is upon a judgment at law.” No account was taken, ly fact found by the decree is, that it was reasonably 50 per week from, etc. We do not think the allega- oofs, as shown by the decree, sufficient to sustain the

The decree is, therefore, in that respect erroneous. ree of the circuit court will be modified, by setting uch thereof as awards judgment and execution in ickery against the plaintiffs in error for \$222.50

In all other respects it will be affirmed. And it that each party pay his own costs in this court.

*Decree affirmed in part and in part reversed.*

JOSEPH MOORE

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Filed at Mt. Vernon June 19, 1894.*

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**CAL LAW**—*proof of the venue.* Without proof that the offense ted in the county alleged in the indictment, a judgment of will be reversed.

an indictment charges the commission of a rape in Madi- proof that it was committed in Upper Alton, without show- county or State Upper Alton is situated, is not sufficient to onviction.

riminal prosecution it devolves upon the People to prove rial allegation of the indictment, and the charge that the ommitted in a particular county is a material averment, and ed, no conviction can be had.

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Brief for the Plaintiff in Error. Opinion of the Court.

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WRIT OF ERROR to the Circuit Court of Madison county; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. J. E. DUNNEGAN, for the plaintiff in error:

There is no evidence that the offense alleged was committed in Madison county or in the State of Illinois. This is a fatal error. *Sullivan v. People*, 114 Ill. 24; *Dougherty v. People*, 118 id. 160; *Rice v. People*, 38 id. 435; *Jackson v. People*, 40 id. 405; *Sattler v. People*, 59 id. 68.

It might be conceded that if it had been shown that the Upper Alton alluded to in the testimony of the witnesses was in the State of Illinois, then the court might know that it was also in Madison county, but as it is not shown to be in the State there is nothing at all whereby to locate it in Madison county, and the venue is not proved. Under this condition of the evidence the plaintiff in error should be awarded a new trial.

Mr. M. T. MOLONEY, Attorney General, and Mr. T. J. SCOFIELD, and Mr. M. L. NEWELL, assistants, for the People.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment against Joseph Moore for the crime of rape, alleged to have been committed on the person of Nellie Shannon, in Madison county, on the 25th day of February, 1893. On a trial before a jury the defendant was found guilty, and his term of imprisonment fixed at six years in the penitentiary. The court overruled a motion for a new trial and rendered judgment on the verdict. Several alleged errors are relied upon to reverse the judgment, but in the view we take of the record it will only be necessary to consider one of them.

It is averred in the indictment that the offense was committed in Madison county. This was a material averment, and unless it was proven by the evidence introduced on the



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Opinion of the Court.

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the offense was committed in the county alleged in the indictment, the judgment will have to be reversed. (*Rice v. The People*, 38 Ill. 435; *Jackson v. The People*, 40 id. 405; *The People*, 59 id. 68; *Dougherty v. The People*, 118

It was proven on the trial that the crime was committed in Upper Alton, and this was the only evidence introduced to prove the venue. In *Sullivan v. The People*, 114 Ill. 435, the indictment charged that the offense was committed in Peoria county, and the evidence showed that the crime was committed on Washington street, in Peoria, Illinois, so that the venue was proven. But that case can not be relied on here. Had the proof shown that the crime was committed in Upper Alton, Illinois, the case cited would be inapplicable, as there was no evidence introduced to show in what county the offense was committed, or in what county or State Upper Alton is located, and in the absence of proof that Upper Alton is in the State of Illinois or in Madison county, the venue was not established by the evidence. For aught that appears, there may be an Upper Alton in Iowa or Indiana, or in another State, and where the evidence merely shows that the crime was committed in Upper Alton, the jury have no way of knowing whether it was committed in this State or in another State. It devolved on the People to prove every allegation of the indictment, and the charge in the indictment that the defendant committed the crime in Madison county, as said before, was a material averment, and unless the jury were not authorized to return a verdict that the defendant was guilty.

The verdict was not sustained by the evidence, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

## Syllabus.

JOHN T. LESTER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Filed at Ottawa January 21, 1890—Rehearing denied June 19, 1894.*

1. **CONSTITUTIONAL LAW**—*seizure of party's books and papers.* While an order for the production of a party's books on the trial, to be used as evidence, in proper cases and upon proper showing, is not an unreasonable seizure of such books, an order of court by which they are taken from his custody and committed to that of a third person, for an indefinite period of time, for an inspection, generally, into all his affairs by the opposite party and his counsel, with leave to take copies of the entries therein, is unwarranted by the law, and is a palpable violation of the constitutional right of a party to be secure against unreasonable seizure of his papers and effects.

2. **STATUTE CONSTRUED**—*relating to production of papers and books.* The purpose and design of section 9, chapter 51, of the Revised Statutes, are to furnish to a party litigant a speedy and summary mode by which a party, under the order of the court, may obtain written evidence pertinent to the issue, which is in the possession and control of his adversary, and thus obviate the necessity of a bill of discovery seeking the same end.

3. This section contemplates the production of evidence on the trial of the cause which the party applying therefor is entitled to introduce in support of his case, and which the other party withholds. A defendant is not required to disclose matters of evidence relied upon in the defense, and thus inform the plaintiff of his case further than the pleadings show. Matters purely of defense are the property rights of the defendant, which he may disclose or not upon the trial.

4. Under the statute the court has power to compel the production of the books of a party, to be used in evidence on the trial by his adversary, upon proper showing that they contain entries tending to prove the issues; but the statute can not be construed as giving the court power and authority to take the books and papers of the party and impound them with an officer of the court for inspection or examination, out of the presence of the court. The statute does not give the right to compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions.

5. **PRACTICE**—*over of instrument sued on.* At common law, in suits upon sealed instruments of which it was necessary to make profert,

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58a 248150 408  
62a 283  
62a 593150 408  
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198 15 82150 408  
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Syllabus.

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adant might demand oyer, and thereby have an inspection of ument sued on. But this was limited to contracts or other nts under seal. By section, 20, chapter 110, of the statute to practice, this rule is extended to all instruments declared her under seal or not.

*ME—inspection of instrument sued on.* Oyer or inspection is to instruments in writing declared upon, and constituting of action, or set up in a plea by way of defense. It does not ere the deed is stated as mere inducement. The common law ished another mode which was not confined to instruments al, which was, by application, pending the action, to the jurisdiction of the court for an order to inspect.

order for inspection was obtainable only in a very limited of cases, as, where one party could be considered as holding at as agent or trustee of the party seeking inspection, or where cant was a party to a written contract of which but one part ed, or where one part had been lost or destroyed; and it was eneral, considered as necessary that the party applying should y to the instrument which he sought to inspect.

*TEMPT—disobedience of unauthorized order.* The court has to require a defendant to place his books in the hands of the ere to remain indefinitely, with leave to the plaintiff to make the entries therein, not for the purpose of being then used ice under the direction of the court, but for the purpose of the plaintiff to prepare his case, and disobedience of such an l not render him liable for an attachment for a contempt.

*ME—disobedience to erroneous order of court—appeal.* As a rule, mere errors in making interlocutory orders will furnish cation for refusing to obey the same, when they do not subject r to the payment of money or to imprisonment. If the party whom such order is made wishes to contest the validity or r of the order, he may refuse to obey, and in the further pro- for contempt he may show in defense that the court had no r to make the order, and if his defense is disallowed, and t is entered against him for a sum of money by way of fine, le by execution or imprisonment, an appeal in his favor will lie.

*ME—when carried on in the name of the People.* In a proceed- a criminal contempt, the general practice is to carry on the ion in the name of the People; but where the proceeding is incident of the principal suit, and is brought to advance the of a party, the practice seems to be to entitle and file the the original cause.

here the contempt consists of something done or omitted, in ence of the court, tending to impede or interrupt its proceed-

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Syllabus.

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ings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing some acts injurious to a party protected by the order of the court which has been forbidden by its order, the proceeding is punitive, and the penalty is inflicted by way of punishment for the wrongful acts, and to vindicate the authority and dignity of the People, as represented in and by their judicial tribunals.

12. In such cases, although the application for the attachment, when necessary to be made, may be made and filed in the original cause, the contempt proceeding will be a distinct case, criminal in its nature, and may properly be docketed and carried on as such, and the judgment entered therein will exhaust the power of the court to further punish for the same act and offense.

13. *SAME—when not a criminal proceeding—appeal.* Cases of that character are distinguishable from cases where a party to a civil suit, having the power to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done, and upon refusal, the court, by way of execution of its order, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. The proceeding in the latter case is a civil one, and an appeal lies from the final order, as in other civil cases.

14. The mere entitling of the cause will not change the nature or character of the proceeding, and render that criminal which is otherwise a civil proceeding. So much of the record as may be necessary to show the order upon which the alleged contempt is based, and the proceedings had in respect thereof, if properly incorporated in the record, will be brought up by appeal from the order in the contempt proceeding, and may be considered on such appeal.

15. A proceeding against a party to a civil action to punish him for refusing to comply with an order to produce his books of account for the inspection of the adverse party, and to enable him to take copies from the entries therein to enable him to prepare his case for trial, is a mere civil remedy, and not criminal.

16. *APPEAL—whether it lies—interlocutory order—order to produce books.* An order of court requiring a defendant to place his private books in the hands of its clerk, that they may be inspected by the plaintiff and his attorney, with leave to examine the same and take copies of the entries therein, to enable them to prepare for trial, is not a final judgment, reviewable on appeal or writ of error, when no steps are taken in execution of such order.

17. *SAME—from judgment imposing a fine for contempt of court.* But if the court, on defendant's refusal to comply with such order, attempts to enforce the same by the imposition of a fine, with an order for an execution for its collection, or by a definite term of imprisonment, as

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Statement of the case.

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for a contempt of court, the judgment of the court imposing such fine or imprisonment will be final, and an appeal will lie from it.

18. *SAME—effect of reversal on motion to dismiss.* The reversal of a judgment by this court is, in effect, an overruling of a motion to dismiss the appeal.

19. *SAME—when it lies directly to this court.* Where the construction of a constitutional provision is involved in an order or proceeding, an appeal lies directly from the trial court to this court.

20. *REHEARING—effect on judgment.* The filing of a petition for a rehearing, under the rules of this court, will have no greater effect than to stay the execution of the judgment pending the petition, and the overruling of the petition will leave the judgment in full force as of the date of its rendition.

APPEAL from the Circuit Court of Cook county; the Hon. S. WILLIAMS, Judge, presiding.

This is an appeal from an order of the circuit court of Cook county, in the suit of *Berkowitz v. Lester et al.*, imposing a fine upon John T. Lester of \$200, for contempt in refusing to comply with an order of that court. Berkowitz brought suits in assumpsit for profits on the purchase and sale of certain stocks, the declaration containing only the common counts. Lester & Co., defendants, were stock brokers. The defendants filed the general issue. Berkowitz claimed that between March 1 and April 10, 1884, he bought and sold stocks on the floor of the New York Stock Exchange, through Lester & Co., as brokers and commission men in Chicago, upon margins, and on his part as mere speculation. The record in that case shows, that on the 16th and 21st days of December, 1885, orders were made denying plaintiff's motions for leave to examine and inspect books of accounts, etc., of defendants, and that on September 23, 1886, an order was made upon the same showing, requiring defendants to produce on the trial of the cause certain books and papers, to be used in evidence therein. On the 12th day of July, 1887, Berkowitz made a further motion in said cause, "for an order on defendants to produce for inspection of the plaintiff and his attorney, for the

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Statement of the case.

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purpose of enabling them to prepare for trial, a book or books kept by defendants during the period of their dealing with or for plaintiff, wherein are written down statements of all daily purchases and sales of stocks by defendants, like those dealt in by defendants for plaintiff; also, book or books kept by defendants during the same period, and wherein are written down the amount of stocks which defendants did carry and were carrying from day to day, and on each day, during the same period." The motion was supported by two affidavits of Berkowitz, in the first of which he swears "that each and every of said books, accounts, memoranda and telegrams contain evidence material and pertinent to the issue; that it is necessary that affiant and his attorney should examine and inspect said books, accounts, memoranda, letters and telegrams, and each of them, in order to properly prepare for the trial of said cause; that they can not properly prepare for said trial without said inspection." The second affidavit of Berkowitz was made May 23, 1887, and undertakes to define, in a general way, the books of which inspection was desired, the purpose of such production being stated as follows: "That affiant can not safely proceed to trial unless affiant and his counsel be allowed to inspect same before trial, and that such inspection is necessary to enable affiant to properly prepare for trial." An order was made allowing the motion.

The defendants having failed to comply with this order, an attachment was issued against them for contempt. Upon the hearing thereof, the defendant, Lester, was fined \$200 for such contempt, which he was ordered to pay, with costs, and to stand committed until the fine and costs should be paid. Lester brings the record to this court by appeal, and assigns the following errors: First, the order of the circuit court of Cook county, of July 12, 1887, is in violation of the fourth amendment of the constitution of the United States; second, the said order is in violation of sections 2 and 6, article 2, of the constitution of the State of Illinois; third, said order is

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Brief for the Appellant.

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unconstitutional and void; fourth, the court erred in entering said order; fifth, the court had no power to make and enter said order at common law or under the statutes of Illinois; sixth, the court had no power to enforce said order by contempt proceedings, and it was erroneous to so attempt to enforce the same; seventh, because no sufficient showing was made to the court to authorize the entry of said order; eighth, because the motion on which said order was based, had, on two previous occasions, been made to the court and denied, and the subject matter of said motion was, as to the circuit court, *res judicata*; ninth, the court erred in denying the motion of appellant to quash the rule to show cause, and the attachment against him, and to set aside the order of July 12, 1887.

Mr. JOHN S. COOK, and Mr. JOHN N. JEWETT, for the appellant:

The order of July 12, 1887, is not justified by the principles of the common law or by the statutes of the State,—and this involves a construction of section 9, chapter 51, of the Revised Statutes.

A party plaintiff has no right to be advised beforehand of the defense which may be made to his suit. Those matters of defense are the peculiar property and right of the defendant, to be disclosed by him, as he may deem proper, upon the trial of the cause. 2 Phillips on Evidence, 330; *Lawrence v. Ocean*, 11 Johns. 245; *Strong v. Strong*, 1 Abb. Pr. 233.

Applications for the production of books and papers will not be allowed when the purpose is what is called a "fishing" one. *Opdike v. Marble*, 44 Barb. 64; *Mott v. Ice Co.* 52 How. Pr. 148; *Cutter v. Poole*, 52 id. 311; *Whetman v. Waller*, 39 Ind. 515; 2 Best on Evidence, sec. 625.

It is essential to an application for the production of books and papers, that it should be made to appear that the books and papers demanded contain material evidence not in the

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Brief for the Appellees.

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possession of the party applying, and the books and papers should also be specifically described. *Walker v. Bank*, 44 Barb. 39; *Law v. Stebbins*, 9 Paige Ch. 622; *Case v. Baupa*, 9 Bos. 595; *Morrison v. Sturges*, 26 How. Pr. 177; *Whetman v. Waller*, 39 Ind. 515.

Inspection of documents in the custody of an adverse party is only permitted when they are to some extent the property of both parties, as, in case of an agreement of which there is but one copy; then the party who holds it is trustee for the other. In the absence of any such interest the court will not interfere. 2 Phillips on Evidence, 324, 326.

The time for calling for books and papers is not until the party requiring them has entered upon his case. Until that period arrives the other party may refuse to produce them. 2 Phillips on Evidence, 538; 2 Starkie on Evidence, 565; 2 Saunders, 224; Wharton on Evidence, 742, 744, 749; Taylor on Evidence, sec. 1586; *Radcliffe v. Bleesby*, 11 C. L. 80.

The order is in violation of sections 2 and 6 of the State constitution. *Kilbourn v. Thompson*, 113 U. S. 168; *Boyd v. United States*, 116 id. 616.

Mr. THOMAS J. SUTHERLAND, for the appellees:

As to the production of written evidence, and the right to inspect the same, see Pollock on Documents, 3; Rev. Stat. chap. 51, sec. 9.

This is a criminal case. *Ex parte Bollig*, 31 Ill. 96; *Tolman v. Jones*, 114 id. 147; *People v. Bradley*, 60 id. 390; *People v. Neill*, 74 id. 68; *Phillips v. Welch*, 11 Nev. 190; *People v. Court of Oyer*, 101 N. Y. 247; *Crook v. People*, 16 Ill. 537.

This being a criminal proceeding, no appeal lies, but the case must be brought up by writ of error. *French v. People*, 77 Ill. 532; *Ingraham v. People*, 94 id. 428; *Walton v. Dev-eling*, 61 id. 206.



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Opinion of the Court.

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The construction of the constitution or validity of a statute is not involved in this case, but if it was, it would not give authority to the Supreme Court to review, in this case, the interlocutory order for production made in the civil case. *Cairo v. Bross*, 99 Ill. 524; *Transfer Co. v. Canty*, 103 id. 424; *Pearson v. Yendall*, 95 U. S. 296; *Pennoyer v. Neff*, id. 733; *Arrowsmith v. Harmoning*, 118 id. 195; *Kennard v. Morgan*, 92 id. 480; *Walker v. Sauvinet*, id. 92; *Ex parte Wall*, 107 id. 271; *Hagar v. Reclamation District No. 108*, 111 id. 707; *Cooley on Const. Lim.* (4th ed.) 435-444.

The Supreme Court, on this appeal, has no authority to review or pass upon the merits of the order of the circuit court made in the assumpsit case of *Berkowitz v. Lester*, for the production of the books. In doing this it has committed a grave error.

The court, in its opinion, erroneously construes the meaning of section 9, chapter 51, of the Revised Statutes of Illinois. *Montague v. Dudman*, 2 Ves. 397; *Kerr on Discovery*, 14, 17; *Wigram on Discovery*, 29.

Section 9 is not a legitimate subject for construction. It means what it says, and permits an order for production before trial, for inspection, as well as at the trial, to be used as evidence.

Mr. CHIEF JUSTICE SHORE delivered the opinion of the Court:

In the original suit of *Berkowitz v. Lester et al.*, out of which this controversy arises, the circuit court made an order upon the defendants to place the books in which the business transactions of the defendants with the plaintiff and other persons were entered, and showing all transactions in which the defendants, as a firm and as individuals, were in any way interested, in the possession of the clerk of the court, that they might be inspected by the plaintiff and his attorney, with leave to examine and take copies, in order that they might, as it was

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Opinion of the Court.

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claimed, prepare for the trial of said cause. Before any proceedings were taken in execution of that order, the defendants brought the case to this court by writ of error, for the purpose of having that order of the circuit court reversed. We then dismissed the writ of error, upon the sole ground that the order was not a final judgment, reviewable upon appeal or error. In delivering its opinion in that case this court said: "It was the privilege of the defendants either to obey the order or to stand in defiance of the power of the court. Had the court attempted to enforce obedience to its order by the imposition of a fine, with an order for execution, or by a definite term of imprisonment, as for a contempt of court, the judgment of the court imposing such fine or imprisonment would be final, and from which an appeal might be taken or to which a writ of error would lie. That would conform exactly with the rule stated by the court in *Blake's case*, 80 Ill. 523. On the reviewing of such a judgment of the court that might deprive defendants either of their property or of their liberty, the propriety of the preliminary or interlocutory order could be considered, otherwise not." (*Lester et al. v. Berkowitz*, 125 Ill. 307.) After this decision the circuit court attached the defendant for contempt, for refusing to obey said order, and imposed a fine of \$200 upon the defendant, Lester, and ordered that he stand committed until the fine and costs of the proceeding were paid, thus bringing the case within the rule there announced, and making the case one in which an appeal will lie.

As a general rule, mere errors in making interlocutory orders will furnish no justification for refusing to obey the same, where they do not subject the party to the payment of money, or imprisonment. If the party against whom such order is made wishes to contest the validity or propriety of the order, he may refuse to obey, and in the further proceeding for contempt he may show in defense that the court had no authority to make the order, and if his defense is disallowed, and judg-

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Opinion of the Court.

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entered against him for a sum of money by way of reparable by execution or imprisonment, an appeal in will lie.

Common law, in suits upon sealed instruments, of which necessary to make perfect, the defendant might demand and thereby have an inspection of the instrument sued on. This was limited to contracts or other instruments sealed, and technically known as deeds. By section 20, §10, of our statute relating to practice, this rule is extended to all instruments declared on, whether under seal or not. It reads: "It shall not be necessary, in any pleading, to aver the perfect of the instrument alleged, but in any action upon an instrument in writing, whether under seal or not, if the same is not lost or destroyed, the opposite party may aver thereof, and proceed thereon in the same manner as if perfect had been properly made according to the law." And it was held, under this statute, that the court might compel the production of the original instrument. *Mason v. Buckmaster*, Beecher's Breese, 27.

The inspection is confined to instruments in writing upon and constituting the cause of action, or set up by way of defense. It does not apply when the deed is as mere inducement. The common law also furnished another mode, which was not confined to instruments sealed. This was by application, pending the action, to the proper jurisdiction of the court for an order to inspect. (See *Documents*, 1.) The order for inspection was given "only in a very limited number of cases, as, where the defendant could be considered as holding a document as agent for one of the party seeking inspection, or where the application was by a party to a written contract of which but one part remained, or where one part has been lost or destroyed, and so, in general, considered necessary that the party should be a party to the instrument which he sought inspection of; and although a trial was sometimes postponed for

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Opinion of the Court.

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the purpose of enabling a party to take proceedings in equity, yet whenever an application to the court of law was in the nature of a bill for discovery, they invariably refused to grant inspection. Ibid. 3.

It is claimed, however, that the order for the production and inspection of the defendants' books is authorized by the statute relating to evidence, (sec. 9, chap. 51,) which provides that "the several courts shall have power, in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue." The evident purpose and design of this statute was to furnish to a party litigant a speedy and summary mode by which, under the order of the court, to obtain written evidence pertinent to the issue which might be in the possession and control of his adversary, and thus obviate the necessity of a bill of discovery, seeking the same end. It is manifest that it contemplates the production of evidence on the trial of the cause which the party applying therefor is entitled to introduce in support of his case, and which the other party withholds. It is only such books or writings as contain evidence pertinent to the issue that are required to be produced, and it is for the purpose of enabling the party demanding their production to introduce such pertinent matter in evidence on the trial. A defendant is not required to disclose matters of evidence relied upon in the defense, and thus inform the plaintiff of his case farther than the pleadings show. Matters purely of defense are the property rights of the defendant, which he may disclose, or not, upon the trial. (2 Phillips on Evidence, 330; *Lawrence v. Ocean*, 11 Johns. 245; *Strong v. Strong*, 1 Abb. Pr. 233.) This is undoubtedly the rule, and unless a showing is made, upon good and sufficient cause, that the evidence sought, or that the books and papers required to be produced, contain evi-

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Opinion of the Court.

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inent to the issue on behalf of the party applying  
he application should be denied.

ntiff, in his motion, and affidavits in support there-  
entirely to show that the books of the defendants  
asked to inspect were required for any purpose of  
n the case. Indeed, it is apparent that the appli-  
not for the production of such books to be used on  
f the cause, but for the inspection of plaintiff and  
d out of court, and for the purpose of preparing the  
plaintiff for trial. It was shown, on the hearing,  
davits filed by defendants, that full and complete  
of all the plaintiff's dealings with the defendant  
rough them, had been furnished, together with a  
ript of his account, and which were attached to the  
f the defendant Peters, filed on the hearing of the  
case. The object and purpose of the applications  
able the plaintiff and his attorney to inspect, not  
accounts of the plaintiff with the defendants, and all  
de on their books in respect of the dealings between  
also the inspection of daily purchases and sales of  
the defendants during the time of the transactions  
aintiff and defendants, irrespective of to or for whom  
se account such sales or purchases were made, and  
f all stocks carried by the defendants for themselves  
from day to day, and on each day during the same  
t was sought, and such was the order of the court,  
ooks of the defendants should be impounded with  
f the court indefinitely, for the purposes of such  
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upon proper showing that they contain entries  
prove the issues; but the statute can not be con-  
giving the court power and authority to take the  
papers of the party and impound them with an

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Opinion of the Court.

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officer of the court for inspection or examination out of the presence of the court. The books sought to be inspected in this case were the property of the defendants, and contained many entries, as it is shown, of business transactions of the defendants with many other persons, and to large amounts, in which the plaintiff had no interest whatever. The right to compel the production of books as evidence is clear. The right to compel their submission to a general examination and inspection out of the presence of the court, even though in the possession of one of its officers, is entirely a different matter. It will not be understood that the rule for the production of books before a master in chancery, in proper cases, is here sought to be stated. It is only such entries as in some way tend to prove a matter material to the issue that are competent to be considered upon compliance with the order to produce the same. It might be, that these books of the defendants might contain entries tending to show illegal transactions upon the stock exchange, or upon the board of trade, of which the entries in such books might become competent evidence against the defendants in penal prosecutions; but such fact, if it existed, or was shown by affidavit to exist, would furnish no ground or justification for the order made. The statute does not give the right to compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions. *Updyke v. Marble*, 44 Barb. 69; *Mott v. Consumers' Ice Co.* 52 How. Pr. 148; *Cutler v. Poole*, 54 id. 311; *Whetman v. Waller*, 39 Ind. 515; 2 Best on Evidence, sec. 625.

The statute under consideration ought, if possible, to receive such a construction as will not render it in conflict with the constitution of the State or of the United States. The constitution of this State provides that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be vio-

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Opinion of the Court.

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oley, in a note to his work on Constitutional Lim-  
p. 307,) after referring to a few cases in which the  
ordered a production of private telegrams, says:  
d suppose, were it not for the opinions to the con-  
tribunals so eminent, that the party could not be en-  
man's private correspondence, whether he obtained  
ing it in the mail, or by compelling the operator of  
aph to testify to it, or by requiring the servant to  
his desk his private letters and journals and bring  
court on *subpœna duces tecum*. Any such compul-  
ss to obtain it seems a most arbitrary and unjustifi-  
e of private papers,—such an unreasonable seizure  
tly condemned by the constitution." See, also,  
. *Thompson*, 113 U. S. 168; *Boyd v. United States*,  
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he constitution, the defendants' private books and  
e protected against unreasonable searches and seiz-  
we think that this constitutional right was violated  
arded by the order of the court. While an order  
duction of a party's books on the trial, to be used  
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nable seizure of them, an order by which his books  
from his custody and committed to that of a third  
r an indefinite period of time, for an inspection,  
into all his affairs by the opposite party and his  
ith leave to take copies of the entries therein, in our  
unwarranted by the law, amounts to an unlawful  
n of his property rights, and is in palpable violation  
stitutional right to be secure against unreasonable  
his papers and effects. The statute under consid-  
s not intended to justify such taking and holding  
ate books of a litigant. As before said, its purpose  
n the party is required to produce, in open court,  
nd papers in his possession or power which contain  
ertinent to the issue, and reasonable opportunity

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Additional opinion of the Court.

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is given for examination thereof in the presence and under the direction of the court.

We are of opinion that the court exceeded its power in requiring the defendants to place their books of account in the hands of the clerk, there to remain indefinitely, with leave to the plaintiff and his attorney to make copies of the entries therein, not for the purpose of being then used in evidence under the direction of the court, but for the purpose of enabling the plaintiff to prepare his case, with the advantage of being advised beforehand of the defendant's defense to his action. The defendant had the right to question the propriety of such order, and, as we have seen, to do so he must refuse to obey. The order being unauthorized, he had a right to disregard it, and there was, therefore, error in the imposition of a fine for his disobedience of such order.

For the reasons given, the order of July 12, 1887, and the judgment of the court in the attachment proceeding, are reversed.

*Judgment reversed.*

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

PER CURIAM: In the petition for rehearing the point is made, among others, that the court failed to determine the motion made in this court to dismiss the appeal. The effect of the judgment of reversal was, as a matter of course, an overruling of the motion, but it is probable that sufficient attention to the point was not given in the opinion.

The first ground upon which the motion was predicated is, that the proceeding is a criminal case, and therefore, if reviewable at all, it can be done only on writ of error. It is insisted that the holding in respect of this question, in the principal case of *Lester et al. v. Berkowitz*, 125 Ill. 307, cited and relied upon in the opinion in this case, was *dictum*, merely. We are of the opinion that this proceeding, although criminal



## Additional opinion of the Court.

is purely a civil remedy, intended to enforce the right of the party litigant. There is, as held in *Howard*, 39 Ga. 358, a clear distinction, both upon and by the authorities, between that class of cases sought to vindicate the authority or dignity of the court and those where the proceeding is remedial, and intended to compel the doing or omission of an act necessary to the administration of justice in enforcing some private right. In *The People v. Compton*, 1 Duer, 572, it is said that "a clear and obvious distinction" exists between contempt proceedings, and those acts denominated contempts which are punished as such only for the purpose of enforcing a civil right.

In *Crook v. The People*, 16 Ill. 534, we said: "Proceedings for contempt are recognized as a right of the party litigant, and distinguishable from merely criminal con-

The authorities sustaining and recognizing this distinction are numerous, from among which may be cited, in addition to those already noted, *Phillips v. Welch*, 11 Nev. 285; *ne's Appeal*, 50 Pa. St. 285; *Cobb v. Black*, 34 Ga. 445; *Wiley v. Bennett*, 4 Paige, 163; *And'r and Ken. Railroad v. And'r Railroad Co.* 49 Me. 392; *Ruhl v. Ruhl*, 24 Ill. 397; *Ex parte Bollig*, 31 Ill. 96; *Buck v. Buck*, 60 id. 315; *Wins v. Gorman*, 25 N. Y. 588. The late case of *The People v. Diedrich*, 141 Ill. 669, is practically conclusive of the question arising upon this branch of the case.

Contempt consists of something done or omitted, to the disrespect or dereliction of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, to obstruct or abuse of its process, or in doing some act in violation of a party protected by the order of the court, which is forbidden by its order, the proceeding is punitive, and is inflicted by way of punishment for the wrongful act, to indicate the authority and dignity of the People, as exercised in and by their judicial tribunals. In such cases, the application for attachment, when necessary to

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Additional opinion of the Court.

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be made, may be made and filed in the original cause, the contempt proceeding will be a distinct case, criminal in its nature, and may properly be docketed and carried on as such, and the judgment entered therein will exhaust the power of the court to further punish for the same act and offense. *Ex parte Kearney*, 7 Wheat. 42; *Cartwright's case*, 114 Mass. 238; *New Orleans v. Steamship Co.* 20 Wall. 392; *Ingraham v. The People*, 94 Ill. 428, and cases *supra*.

Cases of that character are clearly distinguished from cases where a party to a civil suit, having the right to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done, and upon refusal, the court, by way of execution of its order, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant, and not in the public interest or to vindicate any public right, and the proceeding is regarded as coercive, merely. In *The People ex rel. v. Court of Oyer and Terminer*, 101 N. Y. 247, the Court of Appeals of that State, referring to this class of coercive orders, say: "And if imprisonment is ordered, it is awarded, not as punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled, which are essential to his particular rights of person or property. \* \* \* If in this class of cases there exist traces of vindication of public authority, they are faint, and are utterly lost in the characteristic, which is strongly predominant, of protection to private rights imperiled, or indemnity for such rights defeated." In *Phillips v. Welch*, *supra*, the court, after saying, that "if the contempt consists of the refusal of the party to do something he is ordered to do for the benefit or advantage of the other party, the process is civil," then adds,

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Additional opinion of the Court.

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that this distinction is consistent with all the decisions, and in no other way can they be rendered consistent with each other.

It is wholly unimportant whether the original order be for the payment of money, for the delivery of deeds or writings, the production of books, or the doing or omitting to do any other act or thing for the benefit of the adverse party to the civil litigation. The order of which he is alleged to be in contempt was entered solely to advance the private right in the civil proceeding, and any penalty inflicted is by way of execution of that order. (3 Am. and Eng. Ency. of Law, 396, and cases in note.) Nor is the mode of punishment adopted by the court at all important. If punishment is imposed for a criminal contempt, the power of the court to further punish for the same act and offense is exhausted. In the class of cases where the penalty inflicted is intended to be coercive, the party in contempt can only be relieved by compliance with the order. If the defendant had been committed until he complied with the former order, the imprisonment would cease upon such compliance. The imposition of a fine was no less coercive. The appellant could not, by payment of the fine, absolve himself from contempt. The purpose being to compel obedience to its former order, the court would impose other penalties until there was full compliance. If, from the proceeding for criminal contempt, a private party is benefited or his remedy advanced, it will be simply because the conviction operates *in terrorem* upon the wrongdoer, in like manner as would the enforcement of a criminal statute or penal provision; in the other, the purpose is the advancement of the private right of the party in his civil suit. In one class the object of the proceeding is, by punishment of the wrongdoer, to vindicate and preserve the dignity of and respect for the public authority; in the other, to afford relief *inter partes*. Both upon principle and authority this proceeding was therefore a civil proceeding, and an appeal therefore lies from the

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Additional opinion of the Court.

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final order as in other civil causes. *Blake v. Blake*, 80 Ill. 523; *Tolman v. Jones*, 114 id. 147; *Walton v. Develing et al.* 61 id. 206; *People v. Diedrich*, *supra*, and cases cited.

It is insisted, also, that the appeal should have been dismissed, for the reason that this court was without jurisdiction, and that if appeal was allowable it should have been taken to the Appellate Court. A construction of the constitutional provision providing for security against unreasonable searches and seizures of papers and effects of the citizen is fairly raised and pressed in argument. We are of opinion that a construction of the provision of the constitution is so far involved as to give this court, under the statute, jurisdiction on direct appeal. The motion to dismiss the appeal was properly overruled.

It is also insisted in the petition for rehearing, that the original order, and the record in the original cause showing the steps taken precedent to the entry of the order holding the appellant to be in contempt and imposing the penalty, is not properly before us, and a motion was made in this court, originally, to strike out the transcript of the record and bill of exceptions therein. The holding in respect of whether the contempt proceeding should be entitled and prosecuted as an independent proceeding in the name of the People, or carried on as a part of the civil proceeding to which it is incident, is not uniform. The question has ordinarily been treated, as it necessarily is, of comparatively little importance. When the proceeding is for criminal contempt, it would be more appropriate to prosecute in the name of the People, and such is the general practice. (*Cartwright's case*, *supra*.) Where the contempt proceeding is really but an incident of the principal suit, the practice seems to have been to entitle and file the papers in the original cause. (*Buch v. Buch*, *supra*; *Blake v. Blake*, *supra*; *Wightman v. Wightman*, 45 Ill. 167; *Hill v. Crandall*, 52 id. 70; *Dickey v. Reed*, 78 id. 261; *Tolman v.*

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Additional opinion of the Court.

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*Jones, supra*; Rapalje on Contempts, sec. 95.) But in no event could the mere entitling of the cause change the nature or character of the proceedings, and render that criminal which was otherwise a civil proceeding; and in all this class of cases, so much of the record in the original cause as may be necessary to show the order upon which the alleged contempt is based, and the proceedings had in respect thereof, will, if properly incorporated into the record, as is here done, be brought up by appeal from the order in the contempt proceeding, and may be considered on such appeal. The motion was, in effect, overruled, and, we think, properly so.

Suggestion is made of the death of appellant, Lester, since the rendition of judgment of reversal in this court and pending the petition for rehearing. The filing the petition for rehearing can, under the rules of court, have no greater effect than to stay the execution of the judgment pending the petition. It has no effect upon the judgment, and, therefore, if rehearing is to be denied, as it must be in this case, no necessity exists for reviving the suit in the name of the personal representative of appellant, if it is otherwise proper to do so. The order overruling the petition for rehearing would leave the judgment in full force as of the date of its rendition, if rendered in vacation, and as of the last day of the term, if rendered in term time.

We are of opinion that the petition for rehearing should be denied, and this cause having been taken under advisement at the last term of the court, in the Northern Grand Division of the State, where the same is pending, it is now ordered, in vacation, that rehearing be denied.

*Rehearing denied.*

150	428
105a	*880
150	428
112a	*279

## THE GRAND TOWER AND CAPE GIRARDEAU RAILROAD COMPANY

v.

SERENA A. WALTON.

*Filed at Mt. Vernon June 19, 1894.*

1. **EMINENT DOMAIN**—*a proceeding at law.* Where a railroad company is authorized to take private property for a public use under its charter, the mode of procedure is laid down in our statute entitled "Eminent Domain." The proceeding is one at law, and not in equity.

2. **SAME**—*ascertaining damages—under a cross-bill.* While it may be true that a court of equity has no jurisdiction to determine the compensation to be paid for lands proposed to be taken for railroad purposes where a bill is filed for that purpose alone, yet where the land owner has been brought into a court of equity by a railroad company after it has taken and appropriated the lands for its purposes, and it prays for a decree requiring the land owner to convey the lands thus taken, the latter may insist upon being paid for the land taken and damaged, and ask the court, by cross-bill, to have the amount ascertained and determined by a jury to be selected for that purpose.

3. **SPECIFIC PERFORMANCE**—*contract for a deed for a right of way—cross-bill charging fraud.* Where a railway company has a valid contract for a deed for its right of way, a court of equity is the appropriate tribunal to decree a deed in pursuance of the contract. And when such relief is sought by an original bill, the land owner may file his cross-bill, charging fraud in procuring the agreement upon which the company seeks a decree of specific performance.

4. Where an agreement to convey a strip of land for a railroad right of way over certain lands, fixing no definite line, was procured to be executed upon the representations and promises of the agents of the road that the road should be located along a definite and fixed line and along the bank of a slough, and after the agreement to release the right of way the promises and representations were disregarded and the road was built on a different route, it was *held*, that, owing to the fraud practiced by the railway company, a court of equity would not decree specific performance of the agreement, and that a cross-bill setting up fraud was not without equity.

5. **CHANCERY**—*jurisdiction for one purpose—retained for all purposes.* Where a cross-bill is filed in a suit for the specific performance of a contract to make a deed, and the defendant files his cross-bill charging that the contract was procured by fraud and false promises and representations, this will clothe the court of equity with authority to

## Statement of the case.

upon these matters; and such court will have the right, if it do complete justice between the parties, and to settle and equal as well as equitable rights. In other words, when equity jurisdiction it will retain the case, and settle all questions in the relief sought by the bill.

**DICTION—courts of law and equity.** It is a familiar rule that equity have concurrent jurisdiction with courts of law on fraud, and the court which first acquires jurisdiction will till the litigation is finished:

**NCE—impeaching written contract—admissibility of parol** Where parties have reduced their contract to writing, they have settled that parol evidence is not admissible to vary or alter the terms of the contract, but where it is sought to impeach a contract for fraud, in a court of equity, parol evidence is admissible for that purpose.

from the Circuit Court of Union county; the Hon. ROBERTS, Judge, presiding.

A. Walton, appellee, commenced an action at law in the circuit court of Union county, against the Grand Tower and Cape Girardeau Railroad Company, to recover damages to her in consequence of the construction of the railroad and across certain lands owned by her in Union county. After summons was served, the railroad company demurred in equity against the plaintiff in the action, for an injunction to enjoin the prosecution of the action, and also for the execution of the following contract by Serena A. Walton for the right of way, and asked for a specific performance of:

WAS, the Grand Tower and Cape Girardeau Railroad Company has been organized, and intends to construct a railroad from opposite Cape Girardeau to Grand Tower, through the counties of Alexander, Union and Jackson, State of Missouri:

*contract witnesseth*, that in consideration of one dollar, receipt of which is hereby acknowledged, and in further consideration of the benefits that will accrue to me by the construction of said contemplated railroad, I

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Statement of the case.

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hereby agree, contract, covenant and bind myself to make to said company, after the construction of said railroad has been begun, a deed for the right of way one hundred feet wide, the middle thereof to be the center of the main track of said railroad, over, across and through the following described land, lying in the county of Union, in the State of Illinois, to-wit: South-west quarter of section twenty-five (25), and the south-east quarter of section twenty-six (26), and the north-east quarter of section thirty-five (35), all in township thirteen (13), south, range three (3), west, all of which is in Union county, Illinois; with power to take all necessary ground, rock and dirt off and from said right of way, to build embankments and turn-outs: *Provided, however*, that if the work of constructing said railroad between East Cape Girardeau and Grand Tower is not begun and carried on in good faith on or before May 1, 1889, and said railroad finished within one year, this contract to grant the right of way to be utterly null and void. I further agree and contract that the agents, servants and contractors of said company, employed to build said railroad, may enter upon the right of way hereby granted to begin work to construct the said railroad, although the deed to right of way is not made, as fully as if the deed had been made."

Serena A. Walton put in an answer to the bill, in which she admitted the execution of the agreement set out in the bill. The answer also contained the following: "But this defendant expressly avers, and states the fact to be, that the said agreement was entered into by her, and that she was induced to sign said agreement, by and through the fraud and misrepresentations of the complainant and its agents, in this, to-wit, that at the time and before the signing of said contract it was expressly understood and stipulated and promised by the complainant and its agents that said railroad right of way mentioned in the agreement was to be located upon the east bank of a slough known as Dry or Big slough, traversing the



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Statement of the case.

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lands in a northerly and southerly direction, said way to be upon the east bank of said slough where it intersects the southern line of the defendant's lands, and to be upon the east bank of said slough, not fifty feet from the center thereof with the west line of said right of way, said right of way extending in a north-south direction on the east bank of said slough, with the salient end of the reof, and leaving defendant's lands at the north side of a point west of the house thereon situated, near the center of said slough. This defendant, further answering, that the complainant began and carried on the work of constructing the said railroad in pursuance of the terms of the agreement, in good faith, or that it has in any way complied with the terms of said agreement, but, on the contrary, states the fact to be that the said complainant, in violation of the agreement and understanding, did build and construct said railroad and locate its said right of way east of said east bank, to-wit, a distance of two hundred to five hundred feet, in the middle of, or near the center of the defendant's said lands. This defendant denies that said road is built upon and across the land agreed to be left by the defendant, and also denies that the complainant is entitled to a deed for said right of way under said agreement. This defendant admits that she has refused to give up said right of way as described in complainant's bill, and admits that she has brought a suit at law in this case for damages and for the value of the land taken by the complainant's bill.

Defendant, Serena A. Walton, also filed a cross-bill, in which she set up the same facts contained in the answer, and she had forbidden said company and its agents to interfere with the work as it progressed, and praying as relief that said agreement be declared null and void, and that decree payment for the land taken and damaged. The cross-bill also prayed for general relief.

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Brief for the Appellant.

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At the request of the complainant in the cross-bill the following questions of fact were ordered by the court submitted for trial by jury: First, did the defendant in the cross-bill, at the time it secured the right of way over complainant's land, promise the complainant, and agree with her, to build its road on the east bank of Dry slough; second, did the defendant in the cross-bill build its road over complainant's land where it promised to build it; third, what was the value of the land actually taken by said defendant; fourth, what was the damage to complainant's land over and above the benefits, if any.

To the first question the jury answered, Yes; to the second they answered, No. The value of the land taken they found to be \$520. The damage to the lands, over and above the benefits, they found to be \$775. The jury also returned, in answer to a question as to the amount of land actually taken by the railroad, that the number of acres was  $13\frac{4}{100}$ .

Upon the return of the verdict the court entered a decree, in effect, that the equities of the case are not with the complainant in the original bill, and they are with the complainant in the cross-bill; that the original bill be dismissed; that the complainant in the cross-bill recover from said railroad company the sum of \$1295 and costs of suit, and that execution issue therefor; that on payment in full of said amount, the title in fee simple to a tract of land one hundred feet wide, the center being the center of the railroad track across the south-west quarter of section 25, the south-east quarter of section 26, and the north-east quarter of section 35, township 18, south, range 3, west of the third principal meridian, vest in said defendant, its grantees and successors.

MR. ISAAC CLEMENTS, MR. F. M. YOUNGBLOOD, and MR. W. W. BARR, for the appellant:

In a chancery proceeding the relief sought must be equitable relief, and this must appear on the face of the bill.

## Brief for the Appellee.

This rule applies to a cross-bill as well as to an original bill. Story's Eq. Pl. sec. 398; Cooper's Eq. Pl. 86; *Jones v. Smith*, 14 Ill. 229; *Quick v. Lemon*, 105 id. 578.

When a court of equity once acquires jurisdiction it will retain the case, and give complete justice between the parties. But the legal relief must be incidental to the equitable relief sought in the same bill. Story's Eq. Jur. sec. 74b; *Tunesma v. Schuttler*, 114 Ill. 156; *Robinson v. Appleton*, 124 id. 276.

If the equitable relief fails, the legal relief must fail with it. It can only be re-adjusted as an incident to the principal relief sought—the equitable relief. *Daniel v. Green*, 42 Ill. 471; *Green v. Spring*, 43 id. 280; *County of Cook v. Davis*, 143 id. 151.

A false representation, within the meaning of the law, must be as to a past or present state of facts,—not merely as to an intention as to the future. Kerr on Fraud and Mistake, 88; Fry on Specific Per. sec. 101; *Haenni v. Bleisch*, 146 Ill. 262; *Gallaher v. Brunell*, 6 Conn. 346.

It is a general rule that parol evidence can not be admitted to contradict, add to, subtract from or vary the terms of a written contract. 1 Greenleaf on Evidence, sec. 275; 2 Phillips on Evidence, 637; *Lighthall v. Colwell*, 56 Ill. 108; *Gibbons v. Bressler*, 61 id. 110; *Packard v. Van Schoick*, 58 id. 79; *Strehl v. D'Evers*, 66 id. 77; *Tiernan v. Granger*, 65 id. 351; *Coey v. Lehman*, 79 id. 173; *Fowler v. Black*, 136 id. 363.

MR. TAYLOR DODD, and MESSRS. KARRAKER & LINGLE, for the appellee:

The cross-bill, expressly and in substance, charges fraud. Courts of equity and law have concurrent jurisdiction of fraud. Where a court of equity has concurrent jurisdiction with a court of law, the court which first acquires jurisdiction must hold and exercise it until the litigation is ended. *Whitney v. Stevens*, 97 Ill. 482.

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Brief for the Appellee.

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Appellant now argues that the court had no jurisdiction, upon the ground that there is a complete remedy at law. The record shows that the merits of the cross-bill were put in issue by answer, and a trial had thereon. Where respondents to a bill answer to the merits and submit to the jurisdiction of the court, they can not afterward raise the question of jurisdiction. *Schmol v. Fiddick*, 34 Ill. App. 199.

Except in cases where the subject matter is wholly foreign to the jurisdiction of a court of equity, the objection that there is an adequate remedy at law must be raised and urged in the court below, or it will be considered as waived. *Comstock v. Henneberry*, 66 Ill. 212.

The general rule that equity will not grant relief in cases in which the party has a complete remedy at law, has its exceptions in cases of concurrent jurisdiction, in fraud and imposition. Something more than the bare fact that there is a remedy at law is required. The remedy at law must not only appear clear, and not doubtful or difficult, but the remedy there must be as effectual as in equity. *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 id. 46.

Legal rights may be cognizable in equity. If there are equitable conditions authorizing the court to act, it will, to do complete justice, enforce legal as well as equitable rights. *Tunesma v. Schuttler*, 114 Ill. 163.

Equity acquiring jurisdiction, retains the case to settle all questions incident to the principal relief sought, (*Robinson v. Appleton*, 124 Ill. 281,) or for all purposes germane to the subject matter of the original bill, although some such matters have ceased to be in contention. *Hurd v. Ascherman*, 117 Ill. 504.

A court of equity having acquired jurisdiction for one purpose will entertain it for all purposes. *Pratt v. Kendig*, 128 Ill. 302.

When fraud is charged in procuring the execution of a written contract, parol evidence is admissible. *Renshaw v. Gauz*,

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Opinion of the Court.

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7 Pa. St. 117; *Murray v. Duke*, 46 Cal. 644; *Neil v. Speigle*, 33 Ark. 63; *Razor v. Razor*, 39 Ill. App. 529; 2 Wharton on Evidence, sec. 1026; 2 Taylor on Evidence, sec. 1028.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

It is first claimed by the railroad company that the court had no jurisdiction to grant the relief sought by the cross-bill,—that the remedy is cognizable only at law. Where a railroad company is authorized to take private property for a public use, under its charter, the mode of procedure is laid down in our statute entitled “Eminent Domain.” Under that statute private property can not be taken or damaged without just compensation. Such compensation is required to be ascertained by a jury. Where the parties can not agree upon the amount to be paid, the party authorized to take private property is required to apply to the judge of the circuit or county court, either in vacation or term time, by petition, setting forth his or her authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested therein, etc. The statute provides for service of process, and for calling a jury, before whom the question of just compensation shall be tried. The proceeding authorized is one at law. In this case, as has been seen, the amount the land owner was entitled to recover was determined in equity. In the first place, however, the land owner brought an action at law, but the defendant in that action, the railroad company, filed a bill in equity to enjoin its prosecution, and prayed for a specific performance of an alleged agreement, in which the land owner had agreed, upon certain terms and conditions, to convey the right of way. The jurisdiction of a court of equity was thus invoked by the railroad company. It sought a decree compelling the land owner to convey to it the right of way over certain lands owned by her, which the railroad company had taken for its right of way.

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Opinion of the Court.

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While it may be true that a court of equity has no jurisdiction to determine the compensation to be paid for lands proposed to be taken for railroad purposes where a bill has been filed for that purpose alone, yet where the land owner has been brought into a court of equity by the railroad company after it has taken and appropriated the lands for railroad purposes, and it prays for a decree requiring the land owner to convey the lands thus taken, may not the land owner insist upon being paid for the land taken and damaged, and ask the court, by cross-bill, to have the amount ascertained and determined, as was done here?

The cross-bill, in express terms, charged the complainant in the original bill with fraud in procuring the agreement upon which it predicated its bill for a specific performance. It is a familiar rule that courts of equity have concurrent jurisdiction with courts of law on questions of fraud, and the court which first acquires jurisdiction will retain it until the litigation is finished. If, therefore, the agreement was procured by fraud, no reason is perceived why a court of equity might not investigate that question, and grant such relief as the equity of the transaction demanded. So, also, if the complainant, the railroad company, held a valid contract for a deed for the right of way, a court of equity was the appropriate tribunal to decree a deed in pursuance of the contract. Thus it appears that a court of equity had jurisdiction of the relief prayed for in the bill, and it also had jurisdiction of the question of fraud presented by the cross-bill. Being clothed with authority to adjudicate upon these matters, the court had the right, if necessary, to do complete justice between the parties, and to settle and determine legal as well as equitable rights, as held in *Tunesma v. Schuttler*, 114 Ill. 164.

The rule seems to be well established that where equity acquires jurisdiction it will retain the case, and settle all questions incident to the relief sought in the bill. *Stickney v. Goudy*, 132 Ill. 213, is a case in point. It is there said:

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Opinion of the Court.

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court of equity has jurisdiction over a cause for  
se, it may retain the cause for all purposes, and  
a final determination of all the matters at issue.  
reason, if the controversy contains any equitable  
requires any purely equitable relief which would  
the exclusive jurisdiction, or involves any matter  
to the concurrent jurisdiction, by means of which  
equity would acquire, as it were, a partial cogni-  
the court may go on to a complete adjudication,  
thus establish purely legal remedies, which would  
be beyond the scope of its authority."

claimed that appellee was not entitled to equitable  
a failure to establish equitable relief precluded a  
of compensation for the land taken. It will be re-  
that the contract signed by appellee, in which she  
convey the right of way, is silent in regard to the  
which the road should be constructed, and appellee  
at a definite line was agreed upon between her and  
of the railroad company before she signed the agree-  
the road was to be located on that line, and that  
ment for a release of the right of way was executed  
of that agreement. It appears that there was a  
own as "Dry Slough," running through appellee's  
appellee's son, who was in charge of her lands at  
desired the road to be located on the banks of that  
Winstead D. Walton testified that he had charge of  
In February, 1889, he met Captain Nesmith, as-  
sineer, and others, to confer about the right of way.  
me a preliminary survey had been made. He testi-  
new where it ran. I told them then, that in order  
right of way they would have to be on the bank of  
a when they struck our farm from the south side,  
the slough bank, and go out west of the house, at the  
of the farm. The engineer, Captain Nesmith, said  
new exactly where I meant, and it was just about

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Opinion of the Court.

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as good a location for the road and much better for the farm. We agreed to meet up here at town the next day and give them the right of way, with the understanding that they would make that change. I had a conversation with my mother before she signed the agreement. I told her that they had agreed to place the road on the bank of the slough, where I wanted it, and repeated to her what the captain said about that being the place for the road."

Mrs. S. A. Walton testified: "I asked him (Nesmith) who represented the company, and who would be responsible for where the road went. Nesmith said he was. I told him I would not sign it if he did not put it where Winstead wanted it. Nesmith promised to put it where Winstead wanted it. I wouldn't have signed it if he had not promised it. Nesmith knew where the road was to go,—we all understood it. He said that there's where they would put it, because it would be as much to their advantage as mine. I did not give my consent to the company to locate the road where they did. My consent was only for it to go up the slough."

Edward B. Walton testified: "Was present when my mother signed the agreement. Nesmith said it was to be up the slough bank, fifty feet from the center of the slough, or about that. A survey had been made and Nesmith had a plat with him. It showed the line out in the field, but he (Nesmith) said that did not make any difference about where it showed it, but said they would go up the slough bank."

There is other evidence in the record bearing on this question. Nesmith, the assistant engineer, who was acting for the railroad company, confirms the evidence of appellee and her sons. Among other things he testified: "Was detailed to go with citizens' committee to assist in procuring right of way. With them visited the complainant. The preliminary survey had been made at that time, and think the plat was shown her. The complainant wished the line of the road to be as nearly on the bank of the slough as possible, and I told



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Opinion of the Court.

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her that I was instructed to change the line, keeping as near the Dry slough as possible without using reverse curves."

From the evidence it is plain that appellee executed the agreement to release the right of way with the understanding and upon the express agreement of the railway company that the line of road should be changed, and that it should be located through her farm on the banks of the Dry slough, but after the written release was obtained the promises and agreement upon which it was obtained were disregarded, and the road was constructed on a different route, and the railroad company now seeks in a court of equity to compel the execution of a deed conveying the right of way for lands appellee never agreed to convey. The agreement for the right of way was obtained upon the express representation of Nesmith, the agent of the railroad company that the line of the road would be changed so that it would conform to her wishes, and be located along the line of the Dry slough. If this representation had not been made the release would not have been executed. The engineer testified that it would have been better engineering to have placed the road as nearly on the bank of the slough as possible without using reverse curves. This was not, however, done, and the evidence would seem to justify the conclusion that the railroad company did not intend to perform its agreement to change the location of the road at the time it was made. There is some evidence in the record that the route along the slough was impracticable, but the testimony of Nesmith in this regard is not overcome.

It is, however, claimed, that the representation made to appellee establishes only a failure of intention on the part of the railway company to make the change of route, and it is said a representation, although it may be false as to a matter of intention, does not constitute fraud, and in support of this position we are referred to Kerr on Fraud and Mistake, page 88, where the author says: "As distinguished from a false representation of a fact, the false representation as to a mat-

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Opinion of the Court.

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ter of intention not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law, nor does it afford grounds for relief in equity." It is, however, plain that the representations here involved do not fall within the rule here indicated by the author. Here was an agreement to locate the road at a definite specified place on the part of the railroad company. . It was not a mere statement of an intention to do an act in the future, but a contract to change the location, in consideration of which the appellee agreed to give the right of way.

It is also claimed that parol evidence was not admissible to vary or change the terms of the written contract executed by appellee. Where parties have reduced their contract to writing, the rule is well established that parol evidence is not admissible to vary or change the terms of the contract. But this rule of evidence has no application here. Where it is sought to impeach a written contract for fraud, in a court of equity, parol evidence is admissible for that purpose. (*Van-Buskirk v. Day*, 32 Ill. 260; *Race v. Weston*, 86 id. 92; *Wilson v. Haecker*, 85 id. 352.) This rule is well established.

Complaint is also made in regard to the amount of damages recovered by appellee, but upon an examination of the record we find the decree sustained by the evidence. Indeed, under the evidence a much larger amount might have been found by the jury. Moreover, the theory upon which the damages were assessed was so favorable to appellant that it is in no position to complain. The court held, and on this theory the damages were awarded, that inasmuch as appellee had given the railroad company the right of way over her lands on a certain line, and the company having selected a different route, appellee was only entitled to recover the difference in damages, if any, between the two routes.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

## Syllabus.

ERNST A. KOTTER

150 441  
178 324

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Filed at Mt. Vernon June 19, 1894.*

**MENT—charging distinct offenses in one indictment.** In cases where two or more distinct offenses are charged in the same indictment, it may be quashed, or the prosecutor compelled to elect on which he will proceed. But such election will not be required if several counts are introduced solely for the purpose of meeting the case as it may transpire, the charges being substantially for the same offense.

There can be only one transaction embraced in a single indictment, and the only mode of objecting to a joinder of offenses, in a single indictment, is by an application to the court to quash the indictment, or to compel the prosecutor to elect which charge

The defendant moved to quash an indictment charging him with the receipt of three receipts of three different persons, but did not make a formal motion to compel the prosecutor to elect for which he would prosecute, which the court overruled: *Held*, that the court was in error in overruling the motion to quash.

**NAL LAW—FORGERY—intent to damage and defraud.** On the issue of the forgery of receipts, the court, on behalf of the People, instructed the jury, that while it was necessary that the defendant should have forged the receipts with the intent to damage and defraud the persons whose names were signed thereto, yet if they found that the defendant forged the receipts, or either of them, then the law was that the defendant intended to damage and defraud such persons: *Held*, that it was error to give the instruction.

The trial of one for the forgery of three receipts for fees due to his witnesses, where it was claimed that the witnesses had given him their fees, the court instructed the jury as follows: "Though you may believe that all three of the parties (witnesses) in the indictment did agree to give their witness fees to the defendant, still this would not authorize the defendant to sign and forge the names, or either of them, as charged; \* \* \* and if you had a reasonable doubt, that the defendant did forge the receipts of the said parties, or either of them, as charged, you should find the defendant guilty:" *Held*, that the instruction was erroneous.

## Briefs of Counsel.

6. Where a party, acting under the honest belief that certain witnesses have given him their fees due from him, signs the names of such witnesses to a receipt written on a fee bill, and believes that he has the right to sign their names, and has no intention to defraud such witnesses, he will not be guilty of forgery.

7. *SAME—rebutting presumption of intent to defraud.* While an intent to damage and defraud is essential to the crime of forgery, such intent is not an irrebuttable presumption of law, but is an open question of fact for a jury, to be determined from the facts and circumstances shown by the evidence. The presumption of an intent to defraud, from the signing of the name of another, may be overcome by the other circumstances of the case.

WRIT OF ERROR to the Circuit Court of Massac county; the Hon. A. K. VICKERS, Judge, presiding.

Mr. ROBERT W. McCARTNEY, for the plaintiff in error:

It was the duty of the court, on motion, to quash the indictment, or to require the State's attorney to elect on which count he would prosecute. 1 Wharton on Am. Crim. Law, sec. 427; 1 Bishop on Crim. Proc. secs. 455, 459; *Chambers v. People*, 105 Ill. 409; *Sullivan v. People*, 114 id. 24; 29 N. H. 184; 5 S. & R. 591; 10 Cush. 530.

Mr. D. W. HELM, for the People:

A number of counts in an indictment may charge different crimes which are of the same nature. *Parker v. People*, 97 Ill. 33.

It is proper to charge in one indictment counts for a burglary and counts charging receiving stolen property; also, to charge in one count of an indictment forgery, and in another, passing a forged instrument. *Bennett v. People*, 96 Ill. 602; *Lyons v. People*, 68 id. 271; *Tobin v. People*, 104 id. 565.

The prosecutor will not be compelled to elect, even on motion of the defendant, where the several charges in the indictment relate to the same transaction, and the same judgment can be rendered, or where the different counts state the same charge in different ways, to meet the various phases of the

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Opinion of the Court.

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to prevent a variance in the pleading and proof, or greater offense includes the lesser. *West v. People*, 90; *Thompson v. People*, 125 id. 256; *Herman v. 1 id.* 594.

nedy when the indictment charges separate and fenses is not by motion to quash, but by requiring uting attorney to elect. *Myers v. State*, 4 Ohio C. C. *mpson v. People*, 125 Ill. 256; Moore on Crim. Law, 800.

pecially will the judgment not be arrested where the specified in their verdict the count upon which the was found guilty. *United States v. Stetson*, 3 W. &

T. MOLONEY, Attorney General, Mr. T. J. SCOFIELD, M. L. NEWELL, also for the People.

STICE BAKER delivered the opinion of the Court:

A. Kotter, the plaintiff in error, was indicted, tried icted in the Massac circuit court for the crime of nd sentenced to the penitentiary for the term of one e brings the case here by writ of error.

as Kotter is a farmer, and was appointed by the ard as pound-master in the precinct in which he nforce the Stock law. He was probably too zealous rformance of his duties,—at all events, one William levied quite a number of cattle and sheep out of his nd upon the trial in the Massac circuit court Korte ict and judgment against Kotter for the property, ment against him for costs. The seven or more wit- r Kotter sympathized with him in his misfortune, : the trial, all, or most all, of them met Kotter at 's saloon, and agreed to give him their witness fees, ed to sign receipts. Afterwards the deputy sheriff, lled on plaintiff in error with the execution for costs,

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Opinion of the Court.

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plaintiff's fee bill and defendant's fee bill, and was informed by plaintiff in error that his witnesses had agreed to give him their costs, and the deputy having been informed by one or more of said witnesses that such was the fact, handed the "defendant's fee bill" to Kotter, with directions to get them to severally receipt on the fee bill for the witness fees due to them, respectively, and then return the fee bill to him. The fee bill, as handed to Kotter, read thus as to each witness named therein: "Henry Brinker, \$2.00," the name of and amount due each witness following in order, the only difference being that as to some witnesses the amount stated was \$2.00, as to others \$1.90 and as to others \$1.60. When the fee bill was returned to the deputy sheriff there was written after each name and amount, and in the same line, respectively, with that in which was specified the name of each witness and the amount due him, the additional words, "Received my pay," followed by the name of the witness whose name occurred at the beginning of that line. For example, the first line under the printed caption "Names of witnesses," was as follows: "Henry Brinker, \$2.00.—Rec'd my pay—Henry Brinker." And as to each of the other witnesses followed, in regular order, a like line.

The indictment against plaintiff in error contained three counts for forgery: the first count for forging the receipt for the fees due Henry Brinker, the second for forging the receipt for the fees due Ed Seibold, and the third for forging the receipt for the fees due George Kruger. Plaintiff in error made a motion to quash the indictment, which was overruled, and an exception taken. He was then tried before a jury upon a plea of not guilty, and the jury returned a verdict finding him not guilty upon the second and third counts and finding him guilty on the first count, and fixing his term of imprisonment in the penitentiary at one year. Motions for a new trial and in arrest of judgment were regularly and consecutively made by plaintiff in error, but were overruled by the court and ex-

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Opinion of the Court.

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luly taken, and he was then sentenced upon the ver-  
prisonment in the penitentiary for the term of one

f in error insists that the trial court erred in over-  
motion to quash the indictment, since such action  
aim to plead to and go to jail upon three separate  
ct felonies at one and the same time. In 1 Bishop  
al Procedure (sec. 449) it is said: "There can be  
transaction embraced in a single indictment for  
And in section 425 it is said: "The only mode of  
to a joinder of such offenses, in case of felony, is by  
ation to the court to quash the indictment before  
o compel the prosecutor to elect which charge he will  
subsequent stage of the proceedings." And in sec-  
it is said: "One mode of enforcing what is equiva-  
a election is to quash the indictment before trial,  
ppears to the judge that offenses have been unduly  
ad that the prisoner will be thereby prejudiced in his  
In 1 Wharton on American Criminal Law (sec. 416)  
: "In cases of felony, where two or more distinct  
are contained in the same indictment, it may be  
or the prosecutor compelled to elect on which charge  
roceed; but such election will not be required to be  
en several counts are introduced solely for the pur-  
sueing the evidence as it may transpire, the charges  
stantially for the same offense."

le is, that although it is not proper to include sepa-  
distinct felonies in different counts of the same in-  
, it is proper to state the offense in different ways in  
different counts as the pleader may think necessary.  
(*The People*, 68 Ill. 271.) Although it is not proper  
e separate and distinct felonies in different counts of  
indictment, it is allowable to state the same offense  
nt ways, it being understood that all the counts really  
one transaction. *Bennett v. The People*, 96 Ill. 602.

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Opinion of the Court.

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It is urged that no formal motion was made by plaintiff in error to compel the prosecutor to elect upon which count of the indictment he would proceed. It is a sufficient answer to say, that the indictment at bar shows on its face that each count is for a separate and distinct offense, wholly disconnected from each other, and not based on the same transaction. The indictment charged three several forgeries, one charging the forgery of a receipt in the name of Brinker, for the sum of \$2.00 due him, another charging the forgery of a receipt in the name of Seibold, for \$1.90 due him, and the other charging the forgery of a receipt in the name of Kruger, for \$2.00 due him. Suppose the grand jury had returned three separate bills of indictment, one based on the forgery of the name of Brinker to a receipt for \$2.00 due him, another based on the forgery of the name of Seibold to a receipt for \$1.90 due him, and the other based on the forgery of the name of Kruger to a receipt for \$2.00 due him. Can there be any doubt but that in such case there might have been, if the proofs were sufficient, three several convictions for three distinct crimes, and three different judgments for three different terms of imprisonment? We have already seen, from the authorities, that one mode of enforcing an election is to quash the indictment before plea or trial. When the motion to quash was made, the court did not put the prosecuting attorney upon an election, nor did the prosecuting attorney avail himself of the opportunity of entering a *nolle* as to two of the counts, but the court overruled the motion to quash the indictment, it charging three separate and distinct felonies not parts of the same transaction, and afterwards, in the instructions, submitted to the jury the question of the guilt or innocence upon each and every of the counts. It would have been prudent and discreet in plaintiff in error to have entered a formal motion for an election, and to have objected to evidence, and saved exceptions to the rulings of the court thereon; but, as we have seen, the question was sufficiently raised



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Opinion of the Court.

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and saved by the motion to quash, and the overruling of the same, and the exception taken. In our opinion the circuit court erred in overruling the motion to quash the indictment.

Under our statute an indictment for forgery may be found at any time after the commission of the crime. There is nothing that would hereafter preclude an indictment against plaintiff in error for the forgery of the receipt signed "Henry Brinker." We therefore deem it advisable to briefly pass upon the instructions of the trial court and the merits of the case.

The instructions complained of should have been printed in the abstract, but they are not. In many of the instructions given at the instance of the prosecution the word "forged" seems to be used as synonymous with the expression, "signed without authority."

In the fourth instruction of the series the jury were told, that while it was necessary that the defendant forged the receipts with intent to damage and defraud the respective parties whose receipts were forged, yet that if they found that the defendant forged the receipts, or either of them, "then the law presumes that the said defendant intended to damage and defraud the party whose name is proven to be forged." The intent to damage or defraud was a salient and essential part of the People's case. Such intent was not an irrebuttable presumption of law, but was an open question for the jury, to be determined by the facts and circumstances in proof. It was error to give said instruction.

Instruction No. 6 was erroneous, in that it omitted the qualification or requirement of an intent on the part of the defendant to either damage or defraud any person. See definition of forgery in the Criminal Code, 1 Starr & Curtis' Ann. Stat. pp. 783, 784.

Instruction No. 8 was not only erroneous for the same reason that instruction No. 6 was, but was also erroneous in that it told the jury, "even though you may believe that all three of the parties mentioned in the indictment did agree to give

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Opinion of the Court.

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their witness fees to defendant, still this would not authorize the defendant to sign and forge their names, or either of them, as charged in the indictment; and if you find, beyond a reasonable doubt, that the defendant did forge the names of the said parties, or either of them, as charged in the indictment, you should find the defendant guilty." Under this instruction, even if the jury were satisfied, from the evidence, that Brinker, Seibold and Kruger actually said to the defendant that they gave him their witness fees, or that he, in good faith, believed that they had promised to give him such fees, and were further satisfied, from the evidence, that the defendant honestly and in good faith believed that such action on the part of said witnesses authorized him to sign the names of said several witnesses to the respective receipts, and were also satisfied, from the evidence, that defendant had no intention to either damage or defraud the said three witnesses, or either of them, or any one else, yet they were bound, if they followed the instruction, to find the defendant guilty and consign him to the penitentiary.

We may further say, that at the trial, Evers, the deputy sheriff in whose hands execution and fee bills were placed, testified that when Brinker made claim to the \$2.00, and insisted that he had not given his fees to Kotter, he made report to the latter, and Kotter handed him the \$2.00; and also testified that Kotter further said that he had been to Brinker's house twice to see him and did not find him, and so he signed his name to the receipt. Brinker testified that he was not at Pergande's, and denied signing the receipt for his fees, or authorizing any one to sign it, or promising to give his fees to Kotter. Plaintiff in error testified that he thinks that Brinker was at Pergande's. From this evidence, and other testimony in the case, we are satisfied that Brinker was probably not at Pergande's, and made no offer to give his fees and sign a receipt for them, but that plaintiff in error afterwards thought, in good faith, that Brinker was at Pergande's and joined in

Syllabus.

ent to give his fees and receipt for them; that error, being unable to find Brinker, either signed same to the receipt or procured some one else to acting in good faith, and honestly thinking that, circumstances supposed by him to be true, he was to do so, and that he had no intention to damage Brinker.

be that plaintiff in error testified at the trial to ars that were not true; but if so, we regard them as e and injudicious statements of an ignorant man aced in a position of peril, and as having but little any, upon the merits of the issue involved in the orging the name of Brinker. We are satisfied that iltly of the forgery charged in that count, and that for a new trial should have prevailed on that as er grounds.

errors indicated herein the judgment of the circuit versed, and it is ordered that plaintiff in error be from custody.

*Judgment reversed.*

E CONSOLIDATED COAL COMPANY OF ST. LOUIS

v.

THOMAS BRUCE.

*Filed at Mt. Vernon June 19, 1894.*

ICE—proof of ownership of a mine. On the trial of a suit a miner against the alleged owner and operator of a mine, witnesses designated the mine as the defendant's, and one ons who treated the plaintiff for his injuries testified that at paid him for attending on either the defendant or some red at the mine: *Held*, that such evidence, uncontradicted, ndency to show that the defendant was the owner of the as sufficient evidence to justify the court in submitting the the jury.

DILL.

150	449
206	182

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Opinion of the Court.

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2. *NEGLIGENCE—whether proven.* The failure of a miner, while moving a car in a dark, low and narrow passage of a coal mine, having no other light than a lamp carried by him, to discover such a grade in the track upon which the car was standing as would cause the car to run of its own momentum, without having his attention previously called to the grade, does not raise any implication of negligence on the part of the miner, so as to defeat a recovery by him for a personal injury. On the contrary, the failure to make such discovery may be entirely consistent with the exercise of ordinary care.

3. *SAME—a question for the jury.* Where a plaintiff, in his testimony, fully details the circumstances attending his injury, the question, whether he was in the exercise of due care or not, depends wholly upon the construction and force to be given to his evidence. It is a mere question of fact for the jury whether the plaintiff was guilty of negligence.

4. *PRACTICE IN THE SUPREME COURT—errors not urged in the Appellate Court.* This court is not disposed to hold that any error was committed by the Appellate Court in overruling or ignoring assignments of error which were not insisted upon or called to its attention.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Clinton county; the Hon. A. S. WILDERMAN, Judge, presiding.

Mr. CHARLES W. THOMAS, for the plaintiff in error.

MESSTRS. VAN HOOREBEKE & FORD, for the defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was an action on the case, brought by Thomas Bruce against the Consolidated Coal Company of St. Louis, to recover damages for a personal injury. The declaration consisted of two counts, but as the second count was not relied upon by the plaintiff at the trial, it need not be referred to.

The first count alleges, in substance, that at and before the date of the injury complained of, the defendant owned and operated a certain coal mine in Trenton, Clinton county; that certain parts of the mine were extra-hazardous and dangerous for persons unacquainted with the topography of the mine

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Opinion of the Court.

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and its condition; that it was the duty of the defendant to inform and notify its employes, on entering upon their duties in the mine, of the places therein which were extra-hazardous and dangerous, before sending them to work in such parts of the mine, and inform them of the nature and character of such extra hazards and dangers; that on or about January 1, 1891, the plaintiff was employed by the defendant to shovel and load coal in the mine, and that he hired to the defendant for that purpose; that the defendant was informed by the plaintiff that he had but little experience in mines, and none except in shoveling and loading coal; that after his employment by the defendant, to-wit, on the day above mentioned, he commenced to work in the mine at the work he was employed to do, and continued at such work until February 25, 1891, when he was ordered and directed by the defendant to proceed to a part of the mine with which he was wholly unfamiliar and in which he had never been, and bring away a car loaded with dirt then standing in the entry way near one of the rooms of the mine, and unload it in one of the empty rooms some distance along the entry; that the part of the mine where the loaded car was standing, and along the entry to the place where the car was to be unloaded, was extra-hazardous and dangerous, owing to the steep grade in the entry, of which the plaintiff had no notice or knowledge, and was not informed by the defendant; that he proceeded with due care and caution to push the car, for the purpose of moving it along the entry to the place of unloading, but finding that for some reason it would not move, he went in front of it and found some dirt in front of the wheels, which he proceeded to remove; that he then, with due care and caution, pulled on the car, to see whether it was free, when it started forward down the grade, gaining greater velocity as it went; that he endeavored to stop it as it started, so that he might be able to get behind it, but was unable to do so, owing to the steep grade and the momentum of the car; that owing to his

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Opinion of the Court.

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efforts to stop the car, his light was extinguished, and he was left in total darkness, and not being familiar with that part of the mine, and owing to the great speed of the car, he was unable to get out of the way, but was unavoidably struck by the car and thrown against the side of the entry, whereby he received the injuries complained of.

The defendant pleaded not guilty, and at the trial the jury found the defendant guilty, and assessed the plaintiff's damages at \$2000. While the defendant's motion for a new trial was pending, the plaintiff remitted \$500 from his damages, and the court thereupon denied the defendant's motion, and rendered judgment in favor of the plaintiff for \$1500 and costs. On appeal to the Appellate Court the judgment was affirmed, and the judgment of affirmance is now brought to this court for review by writ of error.

At the trial, the defendant introduced no evidence, but at the close of the plaintiff's evidence, the defendant's counsel asked the court to instruct the jury to find the defendant not guilty. This instruction the court refused to give, and the defendant excepted.

The first point made by the defendant's counsel in this court is, that there was no evidence tending to show that the defendant owned or operated the mine in question, and it is contended that because of such defect of proof, the instruction to find the defendant not guilty should have been given. While it is true that the evidence on this question is slight, we can not say that there was no evidence tending to show the defendant's ownership of the mine. One of the witnesses, in speaking of the mine in which the plaintiff was employed and where he was injured, designates it as the defendant's mine. That testimony, uncontradicted and unchallenged, had some tendency to show that the mine was owned and operated by the defendant. One of the surgeons who treated the plaintiff for his injuries was asked whether the defendant paid him his bill for his services and answered that there was

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Opinion of the Court.

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1 which his bill was paid, but whether it was this  
ther he did not remember. If it be true that the  
as the witness evidently means to be understood,  
ll for services as a surgeon rendered to the plain-  
e one else in treatment of injuries received in this  
e inference might also arise from that fact that the  
was operating the mine. On the whole, we think  
sufficient evidence applicable to the question to jus-  
urt in submitting it to the jury.

t urged that the first count of the declaration sets  
ause of action, the criticism upon it being, that  
ce, it shows the absence of due care on the part of  
ff. It is contended that if there was a steep grade  
e where the car which the plaintiff was directed to  
s standing, that was a fact which the plaintiff must  
and known, and that his starting the car by pulling  
him, knowing, as he must have done, that the grade  
wn which the car would run of itself with a momen-  
he could not control, was an act which, on its face,  
ng in ordinary care and prudence. We are unable  
substantial basis for the criticism of the declara-  
ought to be made. It proceeds upon the assump-  
he slight deviation from a horizontal line sufficient  
loaded car to run of its own momentum on iron or  
s, could be readily discovered by casual observation,  
he dark, low and narrow passages of a coal mine,  
her light than the lamp carried by the miner. We  
y that a failure to discover such a grade under such  
nces, on visiting that part of the mine for the first  
without having had his attention previously called  
ject, would raise any implication of negligence. On  
hand, we think his failure to make such discovery  
ntirely consistent with the exercise of ordinary care.  
so insisted that the evidence fails to show that the  
at the time he was injured, was in the exercise of

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Opinion of the Court.

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ordinary care. Much the same argument made in relation to the averments of the declaration is also used in support of this proposition. All we need add to what has been already said is, that the plaintiff having, in his testimony, fully detailed the circumstances attending his injury, the question whether he was in the exercise of due care or not depends wholly upon the construction and force to be given to his evidence. It is therefore a mere question of fact which is conclusively settled by the judgment of the Appellate Court and which we have no power to review.

The further point is made that there is no evidence tending to show that the plaintiff was in the defendant's employ. There is evidence tending to show that the plaintiff was employed by and was working under the directions of a foreman who was superintending the operation of the mine. This, taken in connection with the evidence above referred to tending to show that the defendant was owning and operating the mine, was sufficient to make it a question for the jury to determine, whether the relation of master and servant existed between the defendant and plaintiff.

Some criticism is made upon one instruction given to the jury at the instance of the plaintiff. It appears that, in the Appellate Court, no complaint was made of any of the rulings of the court in the instructions, and as the judgment of that court is the only matter subject to review here, we are not disposed to hold that any error was committed by it in overruling or ignoring assignments of error which were not insisted upon or called to its attention. We have examined the instruction complained of, however, and find it subject to no just criticism.

As we find no error in the decision or judgment of the Appellate Court, its judgment will be affirmed.

*Judgment affirmed.*

MR. JUSTICE PHILLIPS did not sit in this case.



## Syllabus.

CECELIA M. ALLEN *et al.*

v.

ANNA McFARLAND *et al.**Filed at Ottawa June 19, 1894.*

150	455
176	373

150	455
f212	*847
f212	*849

*rules of construction.* In construing a will all of its provisions be considered, and the true intention of the testator, if ascertained. The intention of the testator expressed in, and from, his will, must control in its construction.

*no particular form required.* The law does not require, as to the validity of a will, that it shall be in accord with its form, or couched in language technically appropriate to the ordinary character of the instrument. However irregular or artificial in expression, it will suffice, if, from a consideration of the whole instrument, may be gathered an intention on the part of the testator that a posthumous disposition of his property was intended.

*construed—whether giving an estate, or mere management.* In this will, provided as follows: "I leave all my property in and to my wife, C., to *manage* for the best interest of our children

\* \* \* She is to pay all my debts from the proceeds of my estate. I give her power to sell my house and lot in W., and land in Iowa, if necessary to pay debts," etc. The will also provided that the testator's farm of three hundred and fourteen acres was sold while his wife lived, and gave her the right to sell the same during her lifetime, and to hold unto them, their heirs and assigns, forever." *Held*, that C., the widow, did not take in fee in the farm, and that the same, upon the testator's death, passed to his three children, subject to its management by the widow for her lifetime. In such case the word "leave" did not control.

*whether creating a contingent remainder.* By the fourth clause of the will it was provided that the farm should not be sold during the widow's life, but that on her death it might be divided among his children, or such of them as might be living at that time, and to hold unto them, their heirs and assigns, forever." *Held*, that the children did not take a contingent remainder, but a vested remainder.

It is familiar that contingent remainders are not favored, and will always be regarded as vested unless a contrary intention is clearly manifested. It is an indispensable requisite to a

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Opinion of the Court.

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contingent remainder that there shall be a present vested freehold estate to support it.

6. *SAME—executory devise.* A disposition of land by a testator will not constitute an executory devise where the devisee's right in the estate is vested and immediate, and is not postponed to take effect *in futuro*, or dependent upon any contingency.

• *APPEAL* from the Circuit Court of Marshall county; the Hon. T. M. SHAW, Judge, presiding.

MR. WINSLOW EVANS, for the appellants.

MESSRS. McDougall & Chapman, for the appellees.

MR. JUSTICE SHOPE delivered the opinion of the Court:

This was a bill in equity, in the circuit court of Marshall county, by Anna McFarland, and Birdie Allen, by Anna McFarland, her next friend, for the purpose of construing the will of Abram Allen, of said county, deceased. The will is as follows:

"I, Abram Allen, of the town of Evans, county of Marshall, State of Illinois, being aware of the uncertainty of life, and in failing health, but of sound mind and memory, do make and declare this to be my last will and testament, in manner following, to-wit:

"*First*—I leave all my property in the hands of my wife, Cecelia Matilda Allen, to manage to the best interests of our children and herself. The said children are Charles Abram, Grace Matilda and Mary Elizabeth.

"*Second*—She is to pay all my debts from the proceeds of the farm, but I give her power to sell my house and lot in Wenona, and land in the State of Iowa, if necessary to pay debts, or other good cause.

"*Third*—I have given my sister, Amelia Allen, a note for \$2000, interest at eight per cent, which must be paid yearly; and if my sister finds that the interest is not entirely sufficient to satisfy all her needs, she must have \$200 yearly of the

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Opinion of the Court.

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out if there is any of said money left at my sister's death, it must remain with or revert to my estate. My farm of three hundred and fourteen acres sold while my wife, Cecelia, lives, but at her death divided between my aforesaid children, or as many may be living at that time, to have and to hold their heirs and assigns, forever.

If it should at any time be deemed best by my wife to sell the coal underlying the land, for the income all, I hereby empower her to do so. And further, if actually necessary, and all agree to it, sell and for a coal shaft as is necessary for a shaft and pertaining thereto.

I appoint my wife, Cecelia M. Allen, the executrix of my last will and testament. My will is that she shall be required to give bond or security to the judge of the probate of the faithful execution of the duties of executrix." Recited in the bill, and admitted in the answer, that the probate of said will were duly made; that the testator, surviving him, his widow, Cecelia Matilda Allen, and the three children named in the will; that defendant, Anna McFarland, was married to the said Abram Allen, and there was born, issue of said marriage, complainant Birdie Allen; that said Charles A. Allen, subsequent to the death of the testator, died, leaving as surviving his widow and heir-at-law; that the testator, Allen, died seized of the real estate mentioned in said personal property inventoried at about \$3000; that said widow, Cecelia M. Allen, took possession of all of said property, managed and controlled it, and received the rents and profits, and, since the death of said Charles, the said Anna, widow of said Charles, and said Birdie, have any interest in said land of Abram Allen. Says for construction of the will, alleging that said Birdie is entitled to the one-third of said devised estate, and

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Opinion of the Court.

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said Anna, complainant, entitled to dower therein, and for decree fixing and establishing the several interests therein, etc., and requiring an accounting for the rents, issues and profits of the lots and lands, received by the said Cecelia Matilda, and requiring her, on some short day to be fixed, to pay to complainant Anna McFarland the portion to which she shall be found entitled, and to the said Birdie, or her guardian, when appointed, the share or portion thereof to which she is found to be entitled, and for general relief. The answer denies the interest of the complainants in the premises, and their right to an accounting for the rents and profits, etc.

The court, after finding the facts practically as alleged in the bill, found that, under and by said will, immediately upon the death of Abram Allen, the said Cecelia Matilda Allen thereby became seized in fee of all the real estate above described, in trust, for the benefit of herself and said Charles Abram Allen, Grace Matilda Allen and Mary Elizabeth Allen, and that upon the death of said Charles Abram Allen, Birdie Allen, complainant, became seized of the equitable undivided one-fourth interest in said real estate so held in trust for said Charles Abram Allen, subject, however, to the dower interest of said Anna McFarland therein, which right of dower the court finds in said Anna McFarland. The court further found that the said Cecelia Matilda Allen, as trustee, is subject to be called upon by any of the parties in interest, for an account of the management of her said trust, etc. The defendants below appeal, and both parties assign error upon the record.

It is too familiar to now require citation of authority, that in construing a will all of its provisions are to be considered, and the true intention of the testator, if possible, thus ascertained, and that the intention of the testator, expressed in or fairly drawn from his will, must control in its construction. It is also familiar that the law has not required, as a prerequisite to the validity of a will, that it be in accord with any particular form, or couched in language technically ap-

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Opinion of the Court.

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o the testamentary character of the instrument. regular in form or inartificial in expression, it will rom a consideration of the whole instrument, may lan intention on the part of the maker that a post- sposition of his property was by him intended. on Wills, 33.

in this case may well be said to be *sui generis*, as h of counsel, and our own, has failed to discover a where a will similar to this has been construed by and, indeed, we think none can be found. Aside tablished principles which always obtain with the e construction of wills, nothing has been found in l cases to materially assist in the inquiry.

sted by counsel for appellant, that the widow, Ce- da Allen, became entitled, under the will, to the e testator's property, absolutely. We can not con- view. The first clause of the will is: "I leave all y in the hands of my wife, Cecelia Matilda Allen, to the best interests of our children and herself. hildren are Charles Abram, Grace Matilda and beth." It is at once apparent that in this clause , which, it is practically conceded, is the only one h a devise to the widow is made, contains no ap- vords of devise, or such language as is ordinarily king testamentary bequests. There being no tech- ing in the words as here used, nor, as it would the testator attached to them any other than their natural signification, we must read them in their ad grammatical sense, inasmuch as this would seem nconsistent with the meaning imputed to them by r, or with his intention, as derived from a consid- the whole of the instrument. Hawkins on Wills, *att v. Middleton*, 7 H. L. C. 68.

d the testator mean by the words, "I leave all my 1 the hands of my wife \* \* \* to manage," etc. ?

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Opinion of the Court.

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In *Thorley v. Thorley*, 10 East, 456, the testator gave his estate to his wife during her natural life, and "also at her disposal afterwards, to leave it to whomsoever she pleases," and it was there held that the word "leave" meant that she might dispose of it by will, only. Also, in *McNitt v. Turner*, 16 Wall. 363, the word "leaving" was held to be used in the sense of "owning." These are the only cases we have been able to find where an attempt to define the word "leave" has been made, and it is obvious that the meanings there attributed to the word can not obtain here. In the *Thorley case*, unlike the case at bar, there was no restriction or limitation imposed as to its operation. The property was at the disposal of the wife, to leave to whom she pleased, and the construction there given to the word was thought by the court to better accord with the intention of the testator, as thereby the subject of his bounty would be mostly benefited, for she would then retain her power of disposition to the end of her life. Here, the testator leaves all his property in the hands of his wife, "to manage to the best interests" of the children and herself. No power of appointment or distribution is given, but only that of disposition, in the sense, as we think, a personal representative of the deceased would exercise the same power,—that is, to the best interests of the widow and children and of the estate. And this power is solely, with respect to the Iowa land and Wenona property, to be exercised in case the proceeds of the farm, which is not to be sold in any event, are not sufficient to pay the debts, or for other good cause.

What would have been the effect had the testator, instead of using the language he did, said, "I leave all my property in the hands of (or to) my wife," without the addition of the qualifying words "to manage," etc., need not here be determined. But it may be said, that in the absence of any other language in the will clearly indicating a different or contrary sense, such terms might, in a proper case, be construed as words of devise, where the paper produced is shown

## Opinion of the Court.

to be the act of the deceased, and that it was made *animo testandi*. (1 Jarman on Wills, 34, note 7.) And especially might this be so where the beneficiaries therein named are the natural objects of his bounty. Nor need we here determine what would have been the effect had the widow been given an unrestricted power of disposition, (3 Jarman on Wills, 34, note,) or such power to be exercised by her during her lifetime or widowhood. *Boyd v. Strahan*, 36 Ill. 358; *Mulberry v. Mulberry*, 50 id. 67.

The word "leave," as defined by Webster, means: "6. To put; to place; to deposit; to deliver; to commit; to submit;—with a sense of withdrawing one's self from." By Worcester, as: "1. To let, permit, or suffer to remain. 6. To refer for decision." And we think the sense here indicated is that in which the word "leave" was used by the testator,—that is, he simply meant to put, place, deposit, deliver or commit all his property into her hands to manage, etc. It was all referred to her for decision,—manage to the best interests of the children and herself. He *gives* her no estate or interest therein. When he desires to invest her with a particular power, he does so by the apt words, "I give her power," thereby indicating, it seems to us, a clear understanding on the part of the testator of the meaning and force of the respective terms,—that is, the meaning and volume of the word "leave," as used in the first clause, and of the word "give," as used in the second clause of his will. But if this were not so, and if it be said that the word is susceptible of being used in the sense of "to bequeath," "to give by will," etc., (Worcester, 9th def.; Webster, 7th def. ;) the testator has here, as we have seen, expressly limited and restricted the meaning and operation of the term. This construction is aided and borne out by the subsequent clauses of the will, where the testator takes especial care to give his wife power and authority in respect of property therein mentioned, thereby indicating, as we think, that he did not regard the first clause of the will as sufficient

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Opinion of the Court.

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for the latter purpose. It can not, therefore, be said that the testator, by the use of the words, "I leave all my property in the hands of my wife, to manage," etc., thereby meant to express an intention to give, devise and bequeath unto his wife all his property.

In *Crockett v. Crockett*, 1 Hare, 451, the widow claimed the estate absolutely, and the provision of the will there in question was, that all the testator's property "should be at the disposal of his most true and lawful wife, Caroline Crockett, for herself and children," etc., and it was held that the children took a vested interest in the testator's property at his death, and that a joint tenancy was created. (*Crockett v. Crockett*, 5 Hare, 326.) In the latter case, the petitioner having become of age, his share of the estate was ordered paid to him.

No language is to be found in the will under consideration inconsistent with an intention on the part of the testator that his estate should pass to and vest in his children,—the natural objects of his bounty. If his intention had been to give his estate to his wife, absolutely, it is to be presumed he would have expressed himself in terms at least as explicit as he employs in conferring upon her power to sell. When the testator desired to expressly confer a power or make disposition, it is apparent, from other provisions of the will, that he had no difficulty in using apt and appropriate terms. This is clearly shown in giving power to his executrix to sell to pay debts, in the devise to his sister, and the disposition that may be made of the coal underlying his land.

The authority and duties of the widow, under the will, can not be regarded as postponing, or as incompatible with, the vesting of the title in interest in the heirs-at-law, nor as indicating that it was the intention of the testator that the widow should take an interest in the property in fee. The right of present enjoyment in possession by the heirs-at-law is postponed and the possession of the estate committed to the wife during her life, to be by her managed for the joint



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Opinion of the Court.

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benefit of herself and the children of the testator named in the will. It will be unnecessary to define with accuracy the interest that the wife took in the land,—it is apparent that she took less than an estate in fee for her life. The power of alienation is wanting. To derive the benefit given by the will she must continue in its management and possession. It will in nowise elucidate the subject under discussion to determine the particular quality or character of her estate. That the possession and management of the estate are given to her for the purposes mentioned in the will, is, we think, unquestionable.

But it is further insisted, that by the fourth clause of the will a devise might have been intended, and that as to the land therein mentioned the children would take a contingent remainder. No such construction can, we think, obtain. This provision was evidently made in view and recognition of what had preceded. The will must be construed all together, to learn, if possible, the true intention as to the disposition of the testator's estate. The testator had already left *all* his property in the hands of his wife to manage, etc., and now merely gives direction that said land must not be sold while his wife lives, but at her death it may be divided among his said children, or such of them as may be living at that time, etc., thereby creating no estate, but in all probability having in mind the preservation of the farm intact, as a resource from which the wife might derive support for herself and children until her death. And we think by the words "it may be divided," etc., he simply intended to re-enforce and emphasize what he had already said,—that is, that the farm was not to be sold, but was to be kept undivided and intact until the death of his widow, when, as a matter of course, it might be divided, and not before that time. And it could not well be contended that these words of the will are to be regarded as an inhibition of a sale or other disposition of the land *en masse*, which the children might see proper to make after

## Opinion of the Court.

the death of the widow, although then, by the terms of the will, "it may be divided." It would therefore seem plain that these are neither words of devise nor command, but of direction, merely.

It will be unnecessary to here enter upon a discussion of the doctrine of vested and contingent remainders. The rule is familiar, and requires no citation of authority, that contingent remainders are not favored, and the estate will always be regarded as vested, unless a contrary intention is clearly manifested. No such intention can, we think, be derived from a construction of this will, and it is clear to us that the estate here must be regarded as vested, and not contingent. See *Blanchard v. Blanchard*, 1 Allen, 223; *Price v. Hall*, 5 Eq. (L. R.) 399; *Doe dem. Poor v. Considine*, 6 Wall. 458. Moreover, the indispensable requisite to a contingent remainder of a present vested freehold estate to support it is here wanting. The wife took no estate upon which a remainder might be limited over. Nor did this clause as to the children constitute an executory devise, as their right in the estate was vested and immediate, and was not postponed to take effect *in futuro*, or dependent upon any contingency. 2 Blackstone's Com. 173.

We are of opinion that, *eo instanti*, the death of the testator, the estate vested in his heirs-at-law, charged with the power given to the wife by the will to manage the same during her lifetime, for the benefit of herself and the children of the testator, and of disposition to pay debts, etc. There was necessarily given to the wife a beneficial interest growing out of the proceeds of the estate under her management of it. As already seen, it was to be managed for her benefit, as well as that of the children. It was in the contemplation of the testator that she would pay the debts of his estate out of such proceeds, but if, for any cause, it became necessary, power was given to sell the Wenona property and Iowa land for that purpose. The thought of the testator seems to have been, to

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Opinion of the Court.

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leave his estate under one management during the lifetime of his wife, to be controlled as he had controlled it, in the interest and for the benefit of the family. The leasing of the right to mine coal underlying the land was permitted to the widow, if for the benefit of all concerned, and it is only when a provision is made for a leasing of a portion of the surface of the home farm for the purposes of a coal shaft, that the consent of the children is required. It is apparent that his wife was intended by him to take his place in the management of his estate, and was clothed with a broad, and practically unlimited, discretion in such management. He seems to have had great confidence in her integrity and ability to manage the estate, and left to her discretion, without restriction, what would be management in the interests of herself and children.

It might well be that in case of clear abuse or perversion of the discretion reposed in the widow, or upon her refusal to reasonably nurture, maintain and educate the children of the testator, a court of equity might, upon appropriate bill filed, afford relief, and compel a reasonable distribution of the proceeds of the estate to such uses. But that question is not here presented, and however inviting the field, no discussion of the questions that would then arise would now be proper.

Other questions are presented, but the construction already given to the will under consideration precludes their discussion.

We are of opinion that the circuit court erred in its construction of said will, and its decree will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

*Decree reversed.*

## Syllabus.

ANDREW RAWSON

v.

CLARENCE C. CORBETT, Guardian, *et al.**Filed at Mt. Vernon June 19, 1894.*

1. GUARDIAN—*liability for interest on money not loaned.* A guardian is liable to his wards for interest on money coming to his hands which he neglected to loan, and which might have been loaned.

2. SAME—*account, how to be stated.* Where, at the time a guardian receives a sum of money belonging to his wards, they are indebted to him in considerable amounts, and he continues thereafter to make advances for their maintenance and education, and to pay other sums of money that are charges against their estate, the correct rule for stating his account is to arrange the items thereof in chronological order, and make annual rests.

3. Where, however, the guardian fails for several years to make an inventory or annual report, and makes his final account without annual rests, and no objection is made thereto by the wards, the court may adopt the course of adding to his account such items as he should have been charged with but are omitted by him.

4. SAME—*allowance of an attorney's fee.* Where the failure of a guardian to file an inventory and make reports required by law is the principal cause of the intricate and complex condition in which his accounts are involved, and the great labor required in attending to the matter is owing to his own neglect, his wards ought not to be required to pay an attorney's fee for services in stating the account.

5. DOWER—*right to rents—before assignment.* A surviving wife or husband is not entitled to rents and profits as damages for non-assignment of dower, which have accrued prior to his or her demand for dower and a refusal to assign the same. But the commencement of suit for dower is treated as a demand therefor.

6. SAME—*former decisions—obiter dictum.* The opinion of the court in *Lenfers v. Henke*, 73 Ill. 405, in so far as it states that at common law an infant heir may assign dower, is *obiter dictum*.

7. SAME—*guardian can not assign dower to himself.* Even if the general rule were that a guardian may assign dower for his wards, yet reasons of public policy and public morality would alike preclude the idea that, where one and the same person is both the owner of the dower and the guardian of the infant heirs, he may lawfully assign dower, as such guardian, to himself, as the holder of the dower right, or make an agreement, in his trust capacity, with himself, acting in

150	466
59a	125
150	466
166	513

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185	608
185	609

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Opinion of the Court.

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his own interest, to give to himself, in lieu of that which he is authorized to demand,—an assignment of common right,—something else that he is not authorized to demand except under certain contingencies, which must be found to exist by a court of competent jurisdiction.

8. It would be absurd for a person to make a demand upon himself, and then refuse to comply with such demand; and it seems monstrous that one acting in his own behalf, as the owner of a right of dower, may make a demand upon himself, as the guardian and trustee of the infant heirs, etc., and by simply refusing or neglecting to comply with such demand, make such infant heirs, his own wards, liable to pay him damages.

9. *APPEAL—reviewing controverted questions of fact—guardian's account.* The finding of the facts by the Appellate Court in respect to the settlement of a guardian's accounts is not conclusive on this court on appeal from that court, but this court may adjudicate in respect to controverted questions of fact.

WRIT OF ERROR to the Circuit Court of Madison county; the Hon. B. H. CANBY, Judge, presiding.

Messrs. KROME & HADLEY, and Messrs. DALE & BRADSHAW, for the plaintiff in error.

Messrs. HAPPY & TRAVOUS, and Messrs. E. C. & W. F. SPRINGER, for the defendants in error.

Mr. JUSTICE BAKER delivered the opinion of the Court:

The proceeding embodied in this record was commenced in the county court of Madison county, and is the final settlement of Andrew Rawson, late guardian of William T. Ground, Richie B. Ground and Brittania S. Ground, in respect to his care and management of their property and estate. Clarence C. Corbett, the now guardian of said William T. Ground and Richie B. Ground, minors, and the said Brittania S. Ground, who had arrived at full age, appeared and filed exceptions to the report made by and accounts presented by said Rawson. From the findings made and orders entered in the county court an appeal was taken to the circuit court of the same county. There was a hearing or trial *de novo* in this latter

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Opinion of the Court.

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court, and certain findings and final orders made and entered of record, and thereupon Rawson sued out a writ of error from the Appellate Court for the Fourth District, alleging that in such findings and orders and record there was manifest error. The Appellate Court in part affirmed and in part reversed the findings of the circuit court, and remanded the cause for further proceedings in conformity with the opinion of the Appellate Court then delivered. (See *Rawson v. Corbett et al.* 43 Ill. App. 127.) Rawson, plaintiff in error, then sued out this writ of error to the Appellate Court, and brought the record here.

There is a preliminary question to dispose of. It is suggested by defendants in error that the orders and judgment of the Appellate Court are final as to all questions of fact. Such is not the law. County courts in this State (of course excluding counties in which probate courts have been established under the act in force July 1, 1877,) have equitable jurisdiction in the adjustment of the accounts of guardians, and in such cases may adopt the forms of procedure in equity. (*In re Steele et al.* 65 Ill. 322.) And in the late case of *Kingsbury v. Powers*, 131 Ill. 182, this court held, by necessary implication, that it had power to adjudicate in respect to controverted questions of fact.

Nine errors here have been assigned by plaintiff in error upon the record of the Appellate Court, and three of these it will not be necessary to formally notice. No cross-errors have been assigned thereon by defendants in error.

The first assignment of error is, that the Appellate Court held that plaintiff in error was liable for \$1470 interest on what is called in the record the Siedler loan; and the second assignment is, that said court erred in holding plaintiff in error entitled to no credits on account of said loan. These assignments, as we understand counsel, refer to the same subject matter, and may be considered together.

The above mentioned sum of \$1470 is made up by three items of interest, supposed to have been paid on the Siedler

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Opinion of the Court.

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loan and mortgage,—i. e., amount paid out of the Schmidt rent, \$1013.20, amount paid through John G. Irwin, \$106.80, and interest from February 12, 1885, to January 12, 1888, \$350.

It is admitted by defendants in error, in their brief and argument filed in this court, that the Appellate Court erroneously charged plaintiff in error with "interest on Siedler mortgage paid out of Schmidt rent, \$1013.20." The occasion for this admission is, that said court also charged plaintiff in error with the full amount of the Schmidt rent. Rawson, very clearly, should not be required to pay this \$1013.20 twice.

The \$106.80 was paid by Irwin, acting as attorney and agent of plaintiff in error, out of the Taylor fund, hereinafter mentioned, as interest on the Siedler note and mortgage. Said note was the note of plaintiff in error and his brother, Samuel Rawson, given by them for their own debt of \$2000, but secured by a mortgage executed by Sylvania E. Rawson, wife of plaintiff in error, and mother, by a former husband, of the three wards of plaintiff in error, upon lands which were her own separate property. Irwin paid in settlement of said debt and mortgage \$2106.80, the \$2000 being the principal, and \$106.80 the interest. This was all paid out of the Taylor fund, which belonged to the wards. At the trial *de novo* in the circuit court, plaintiff in error presented amended accounts, in which he charged himself with the whole of the principal of the Taylor fund, \$6833, and if he is charged with interest upon the whole of the Taylor fund, as was done by the order and judgment of the Appellate Court, then, if he is also charged with the item in question of \$106.80, he is forced to pay the same interest twice.

The charge of \$350 interest must have arisen from a misapprehension of the record on the part of the court, for if Irwin, by paying the \$2106.80, paid up in full the amount of both principal and interest due on the note and mortgage, then, manifestly, no interest could thereafter accrue thereon.

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Opinion of the Court.

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We think that the two assignments of error in question are well assigned, and that the three items of interest based on the Siedler transaction, and amounting in the aggregate of \$1470, should be stricken from the debit side of the accounts of plaintiff in error.

The third assignment of error is, that the Appellate Court erred in holding plaintiff in error liable for interest upon the whole of the Taylor fund, and the fourth is, that it was error not to hold him liable only for interest upon annual balances; and these two assignments are also so connected with each other that they can be disposed of together.

That which is called the Taylor fund amounted in the aggregate, as already stated, to \$6833. It was inherited by the three wards from the estate of their grandmother, and was received by plaintiff in error, their guardian, as follows: \$4863.69 on February 11, 1882, and \$1969.32 on March 12, 1883, both amounts being received in the form of checks drawn by the master in chancery. These checks were not collected by plaintiff in error until January 1, 1885, when they were cashed and the money handed over to Irwin to loan. Irwin loaned this money and collected interest to the amount of \$1071.49, as found by the Appellate Court. We understand it to be conceded, and plainly it could not well be controverted, that plaintiff in error is liable for this item of interest. The total amount of interest on the Taylor fund charged by the Appellate Court to the debit side of the guardian's accounts was \$2059.37. In making up this latter amount, the court charged the guardian with \$987.88 of interest that he never received. This arose from the fact that through neglect of statutory duty on the part of the guardian, (Guardians and Wards act, sec. 22,) the sum of \$4863.69 lay idle, not loaned or invested, and earning nothing, from February 11, 1882, until January 1, 1885, and the further sum of \$1969.32, by like neglect of duty, was left in like condition from March 12, 1883, until January 1, 1885.



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Opinion of the Court.

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Plaintiff in error concedes that he, as guardian, should have been charged with interest on money in his hands which he failed to loan when he might have done so, but he insists that the Appellate Court, in charging him with \$987.88 interest not collected, assumed that the whole of each of the aforesaid installments of the Taylor fund were the moneys of his wards from the times they were respectively received, and so remained, continuously, thenceforward, and until January 1, 1885. In other words, his contention is, that at the time the first installment was received the wards were indebted to him in considerable amounts, and that he thereafter, and until January 1, 1885, continued to make advances to pay for their maintenance and education, and to pay other sums of money that were charged against their estate, and that, therefore, annual rests should have been made in computing the amount he was liable to pay them for unearned interest. Defendants in error admit that the correct rule in stating a guardian's account is to arrange the items in chronological order, and make annual rests, etc. They insist, however, that the guardian having chosen to state his accounts in the manner shown by his report, and no objection having been made thereto by or on behalf of his wards, the Appellate Court adopted the proper course by adding to the accounts such items as he should have been charged with but were omitted by him.

We are inclined to concur in the suggestions made by defendants in error; and we may add, that in this case the guardian never complied with his statutory duty to return to the county court which appointed him, an inventory of the real and personal estate of his wards; (1 Starr & Curtis' Stat. chap. 64, secs. 12, 13;) that he wholly and persistently neglected, for a period of seven or eight years, and until the filing of his first report herein, to perform the further duty peremptorily enjoined by the statute, (sec. 14,) which requires that "the guardian shall, at the expiration of a year from his appointment, settle his accounts as guardian with the county

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Opinion of the Court.

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court, and at least once every three years;" (see, also, sec. 16;) that neither in his original report and accounts presented to the county court, nor in his amended reports and accounts presented in the circuit court at the time of the hearing and trial of this proceeding, did he make any claim or suggestion of annual rests, or that at any time during his administration of the estate of his wards such wards were indebted to him, and he, therefore, not chargeable with interest on the trust funds that came to his hands that had not been put and kept at interest, in conformity with the requirements of the statute. (Sec. 22.)

It would be an arduous and unreasonable burden, and one, perhaps, impossible of accomplishment, for an appellate tribunal to work its slow way through a voluminous record, containing, along with a large quantity of oral and other testimony, the accounts, both debits and credits, of the guardian with each of his three wards, and said accounts accompanied by seven lengthy exhibits, containing the items, in detail, of seven and a half years' administration of the estates of said three wards,—and this, for the purpose of ascertaining, by comparison, whether or not, at a number of particular dates, the affairs of the administration were in such condition as that interest should not be charged upon the whole of this trust fund called the Taylor fund. And more especially ought not such a task to be undertaken, when the guardian, in his report and accounts, has made no claim of that sort, and when the complicated condition of his accounts, and of the several trust funds committed to his care, is owing to his own negligence and his failure to make reports as required by law.

In our opinion the Appellate Court committed no error when it simply added to the accounts presented by the guardian such items of charge against him as were valid, but omitted from the report presented for approval.

It is urged that the Appellate Court erred in holding that plaintiff in error was not entitled to one-third of the rents of

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Opinion of the Court.

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the lands of which his wife died seized, as and for his dower therein. After Brittanias S. Ground, one of the wards, became of age, and Corbett, the present guardian of the other two wards, had become such guardian, plaintiff in error conveyed the residue of his dower interest to his former wards in consideration of \$800. His contention is, that he should have been allowed, in the settlement of his guardianship, one-third of the rents that accrued from the lands of his deceased wife, from the date of her death until the time of making the agreement to convey the residue of his dower to the heirs.

Section 18 of the Dower act makes it the duty of the heir or next freeholder to assign dower in lands of which any person is entitled to dower. Section 19 provides that if this is not done within one month after the death of the deceased husband or wife, the surviving wife or husband may sue for and recover dower by petition in chancery. Section 21 provides that infants may petition by guardian or next friend, and that when an infant is a defendant he may appear by guardian or guardian *ad litem*. Section 41 provides that whenever, in any action brought for the purpose, a surviving husband or wife recovers dower in any lands, he or she shall be entitled to recover reasonable damages from the time of his or her demand, and a refusal to assign reasonable dower. And section 43 makes provision for heirs, or, if under age, their guardians, or any other persons interested in the lands, filing a petition to have dower assigned to any person entitled thereto.

*Atkin v. Merrell*, 39 Ill. 62, was a bill in chancery, and it was there held that a widow was not entitled to rents and profits as damages for non-assignment of dower, which have accrued prior to her demand for dower and a refusal to assign the same; that from the time such a demand is made she is entitled to damages; that a third of the rents which may have accrued after the demand would form their proper measure,

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Opinion of the Court.

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and that the commencement of a suit for an assignment of dower may be regarded as a demand therefor.

*Bonner v. Peterson*, 44 Ill. 253, was also a bill in chancery, and there the same doctrine was held as that held in *Atkin v. Merrell*, *supra*. The court, in its opinion, said: "If the heir is of age, then the demand is on a person who can act, and failing to comply with the demand, he is in default, and the widow is entitled to damages from that date. \* \* \* It has, however, been uniformly held that the commencement of a suit for dower is a legal demand for dower. It then follows, that when a suit is commenced against the minor heir to have her dower allotted to her, this is such a demand as the statute contemplates, and from that time the widow will be entitled to damages for withholding her dower. \* \* \* It then follows, that the heir in this case is only liable to damages from the time when this suit was instituted. The measure of such damages is usually the net profits or income of one-third of the estate in which the widow has dower. \* \* \* It then follows, that the heir in this case should be required to account for one-third of the net proceeds of the rents and profits derived from the real estate in which the widow is entitled to dower, received from the commencement of this suit in the court below. \* \* \* This is the true measure of damages in this case for the delay in assigning the dower."

*Peyton v. Jeffries*, 50 Ill. 143, and *Strawn v. Strawn's Heirs*, *id.* 256, are to like effect with the two cases above mentioned; and *Toledo, Peoria and Warsaw Railway Co. v. Curtenius*, 65 Ill. 120, *Simpson v. Ham*, 78 *id.* 203, *Cox v. Garst*, 105 *id.* 342, *Lennahan v. O'Keefe*, 107 *id.* 620, and *Cool v. Jackman*, 13 Bradw. 560, and probably other cases, announce the same rule.

Among the authorities relied upon by plaintiff in error in support of his claim that he is entitled to one-third of the rents derived from the lands of which his wife died seized, during the time that elapsed between the date of her death and the date when he sold his dower right, are two cases de-

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Opinion of the Court.

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s court,—*Clark v. Burnside*, 15 Ill. 62, and *Len-  
e*, 73 id. 405. We are unable to see in what way  
*Burnside* assists his claim. It seems to us that it  
ates against it. The statute then in force, (Rev.  
chap. 34, sec. 31,) as well as the statute now in  
arr & Curtis' Ann. Stat. chap. 41, sec. 43,) gave  
dian of heirs under age authority to petition to  
assigned. The widow in *Clark v. Burnside* was  
n of the farm, not as dowress, but by virtue of her  
arantine given her by the statute then in force,  
1845, chap. 34, sec. 27,) and it was held that not  
ardian of the infant heirs, but also his estate after  
was liable for the damages occasioned the wards  
rdian's non-performance of duty in failing to in-  
eedings for the assignment of dower, and then  
portion of the farm set apart to his wards.

s v. *Henke*, *supra*, it was held that where a widow  
in fee of a one-third interest in mineral land and  
of dower in the other two-thirds, and the heir was  
e of said two-thirds, and they made an agreement,  
nines were opened, that each should receive one-  
rents and profits of the mines, such agreement  
garded as an assignment of dower as to the two-  
l further held, that when an heir of lawful age  
ssignment of dower in mineral land, by giving the  
listinct portion of the rents, it will, if fairly made,  
ir and all privies in estate, and also held that an  
of dower may be made by parol. We have no  
with said several propositions as held by the court,  
tand them to be correct statements of the law; but  
thing in them that conflicts in the least with the  
own in the line of cases we have above cited. It is  
ie justice who wrote the opinion of the court in the  
e, not only decided that case, but added a remark  
t that at common law an infant heir may assign

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Opinion of the Court.

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dower; but that question was not involved in the case that was being adjudicated, and was palpably *obiter dictum*, and possibly in conflict with some things either said or held in one or more of the cases cited by us. But whether or not the *dictum* is a correct statement of the common law, or even of the law that is in force in this State, is so wholly immaterial in the decision of the case now in hand that we do not deem it worth while to neglect other duties in order to consider of the matter, and so, for the purposes of this decision, and for that purpose only, we may assume the law to be that an infant heir, or his guardian, may, either of them, assign dower. But we will not consider that subject further until we have disposed of another matter.

Upon what we regard as the real issue here,—whether a surviving husband or wife who has a dower right, but whose dower has never been assigned, and no demand, or what is equivalent to a demand, has been made for its assignment, is entitled to receive a share of the accrued rents and profits,—some cases and other authorities have been cited as to the rule that obtains in other jurisdictions. It may be that a different rule has been announced elsewhere than that established in this State by a long line of adjudicated cases. If so, we may say that the rule that was followed by the Appellate Court in deciding this branch of the proceeding now at bar has been enunciated in so many cases, and for such a long period of time, that it has become a rule of property, and must be adhered to.

We will go back now to a matter upon which considerable stress seems to be placed by counsel. We assumed, for the purposes of this decision only, that an infant heir or his guardian may make a valid assignment of dower. How stands this case then? It is conceded, and must be, that dower has never been assigned by any proceedings in any court, that a proceeding of that kind has never been commenced in any court, and that there has been no assignment of dower by any

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Opinion of the Court.

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ment of the infant heirs, they acting or agreeing in their own behalf, or through any agent ap-  
pearing for themselves. It is, or must be, also conceded that  
there has never been any demand, or anything equivalent  
, made by plaintiff in error, or any one in his  
assignment of dower, upon the infant heirs, or  
himself, or upon any one authorized to act for them,  
that such demand was made upon their guardian.  
This leaves only two questions to be solved. Was there  
an assignment of dower, by act or agreement, of any  
kind, authorized to so act or agree for the infant heirs? And,  
if not, was any demand made upon their guardian to assign

to the first question, it is sufficiently answered  
by the testimony of plaintiff in error himself, and that of Ir-  
win and agent, given at the hearing of the cause.  
Plaintiff in error, testifying in respect to the status of af-  
ter he sold the residue of his dower right, swore  
that at that time nothing had been done to have his dower  
assigned. Irwin testified: "I knew all the time that if  
dower was assigned, he (meaning plaintiff in error) was  
liable to his partnership creditors." And besides this,  
there is no evidence whatever tending in the least degree to  
show that the infant heirs specially authorized any one to as-

And even if the general rule were that a guard-  
ian assigns dower for his wards, yet reasons of public  
policy and public morality alike preclude the idea that where  
the same person is both the owner of the dower right  
and guardian of the infant heirs, he may lawfully assign  
the dower to himself, as the holder of the dower  
right, or make an agreement, in his trust capacity, with him-  
self, in his own interest, to give to himself, in lieu of  
what he is authorized to demand,—“an assignment of  
dower right,”—something else that he is not authorized to  
make, except under certain contingencies, which must be

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Opinion of the Court.

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found to exist by a court of competent jurisdiction. Dower act, sec. 39.

The second question above suggested,—whether there was any demand made upon the guardian of these infant heirs to assign dower to said guardian,—is sufficiently answered by what we have said in regard to the first question. It seems to us that it would be absurd for a person to make a demand upon himself, and then refuse to comply with such demand. And it seems to us monstrous that one acting in his own behalf, as the owner of a right of dower, may make a demand upon himself, as the guardian and trustee of infant heirs, and by simply refusing or neglecting to comply with such demand, make such infant heirs, his own wards, liable to pay him damages.

The last assignment of error upon the Appellate Court record is to the effect that said court erred in disallowing the \$300 attorney's fees, asked by plaintiff in error. This allegation of error is sufficiently answered by quoting from the opinion filed in the Appellate Court what is there said in regard to this item, and adopting that as expressive of our own views. The language of that opinion is, substantially, as follows: "The guardian asks credit for the sum of \$300 as an attorney's fee paid John G. Irwin in and about the duties of the guardian and the making of this report. The guardian's own failure to file an inventory and make the reports required by law was the principal cause of the intricate and complex condition in which the accounts are, and the great labor required in attending to the matter is owing to his own neglect, and the wards ought not be compelled to pay for that service."

It follows from that which we have said, that we find no substantial error in the orders and judgment of the Appellate Court, other than in charging plaintiff in error with the three items regarding interest upon what is called the Siedler loan. Said items are, respectively, \$106.80, \$1013.20 and \$350,



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Opinion of the Court.

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making an aggregate of \$1470. In respect to these three items the orders and judgment are reversed.

Said court, in stating the account between plaintiff in error and his ward Brittanias S. Ground, found that there was due her \$969.40. From this \$969.40 should be deducted one-third of the over-charge of \$1470, and this makes the true and correct amount due said ward to be \$479.40. Making a like deduction from the \$2114.62 found to be due his ward Richie B. Ground, leaves the true and correct amount due said ward to be \$1624.62. And making a like deduction from the \$1997.40 found to be due his ward William T. Ground, leaves the true and correct amount due said ward to be \$1507.40.

The findings, orders and judgment of the Appellate Court are in part affirmed and in part reversed. The cause is remanded to the circuit court of Madison county for further proceedings in conformity with the opinion of the Appellate Court, so far as that opinion is not in conflict with the views herein expressed, and also in conformity with this opinion. Inasmuch as the writ of error herein to the Appellate Court has resulted in reducing the amount found due from plaintiff in error to his wards to the extent of \$1470, it is ordered that the costs of this court be paid by the defendants in error herein.

*Judgment affirmed in part and in part reversed.*

Mr. JUSTICE PHILLIPS, having heard this case in the Appellate Court, took no part in this decision.

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Syllabus.

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THE JACKSONVILLE, LOUISVILLE AND ST. LOUIS RAILWAY COMPANY

v.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY. *101*

*Filed at Mt. Vernon June 19, 1894.*

1. **CONTRACT—construction.** A written contract must be given the meaning understood and intended by the parties at the time of its execution, and where the words "terminal facilities," as used in a railroad lease, have a meaning understood by railroad men, it will be presumed that those words were employed by the parties to the contract to be interpreted in accordance with such general understanding by railroad men.

2. A lease between two railway companies provided for the payment of rent for the use of a part of the track of the lessor company and for terminal facilities. The lessor company switched cars for the lessee company over tracks leading to the shops of a car works company, and sought to recover switching charges therefor, in addition to the amount agreed in the contract to be paid for terminal facilities: *Held*, that the car works track was not a part of the lessor's terminal facilities, and that switching cars over it to and from the shops was a service separate and distinct from the services included in the contract, and that the lessor was entitled to recover the amount such separate service was reasonably worth.

3. **LANDLORD AND TENANT—liability of successor of lessee for rent.** Where the lessee of a railroad agrees, on behalf of itself and its successors and assigns, to comply with the terms of the lease, and, among other things, to pay the rent reserved, and other charges, a person or company who succeeds to the rights of the lessee, and continues to use the leased premises as the lessee had done, will become liable to pay the rent specified in the lease to the lessor.

4. In an action by a railway company against the successor of its lessee, the court instructed the jury, on behalf of the plaintiff, that if they believe, from the evidence, that the defendant is the successor of the lessee, and, as such successor, came into possession of the property, rights and franchises of the lessee, and that the defendant, since coming into such possession, had been operating such railway and running its trains over the plaintiff's railroad, and using the terminal facilities of the plaintiff for freight and passenger business, and had been furnished with supplies, etc., and that defendant has claimed the right, under the contract of leasing, to operate its trains over plaintiff's railroad between the points named in the lease, and to use

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Statement of the case.

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inal facilities in its business, then the defendant is liable for such sum as they might find, from the evidence, was the original lease, for rent of track, etc.: *Held*, that the same is not erroneous.

tion by the lessor against one as the successor of the parties recognized and acted under the contract of lease and binding contract between them during the time the land and occupied plaintiff's property, no formal assignment to the lessee will be necessary to a recovery under it by reason of a breach of its conditions.

*Recovery of rent under common counts.* In an action by the defendant, under the common counts, the plaintiff is not bound to show a formal contract, in order to recover a reasonable price for the occupation of its property.

in the Appellate Court for the Fourth District;—the court on appeal from the Circuit Court of Jefferson; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

an action of assumpsit, in the circuit court of Jefferson, brought by appellee, to recover certain indebtedness of appellant, alleged to be due and unpaid. The complaint contained the common counts and one special count being upon a contract therein set out, entered into between appellee and the Jacksonville Southeastern Railway Company, April 15, 1888, and alleging that appellant, by its contract, took to the rights, property and franchises of the Jacksonville Southeastern Railway Company, became, under the contract, liable to appellee for the use and occupation of the tracks between Drivers station and Mt. Vernon, for its terminal facilities, passenger and freight depots at Mt. Vernon, for labor, supplies and materials furnished, for hiring cars for appellant to and from the car shops, and for the payment of the several amounts therein alleged to be due. To the declaration the defendant pleaded denial of the issue, and trial was had by jury, resulting in a verdict against appellant for \$5972.88. On appeal to the Appellate Court this judgment was affirmed.

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Opinion of the Court.

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MESSRS. MORRISON & WORTHINGTON, for the appellant.

MR. J. M. HAMILL, for the appellee.

PER CURIAM: It will not be necessary for us to enter upon any extended discussion of the questions presented upon this record for our determination. A careful and painstaking consideration has satisfied us that the conclusion reached by the Appellate Court was correct, and the following opinion of that court has been adopted, as meeting the objections raised and as appropriately expressing the views entertained by us upon questions of law involved in the case:

GREEN, J.: "This was a suit in assumpsit, by appellee, against the appellant, brought to recover rent of track, rent of depots and terminal facilities at Mt. Vernon, for supplies, material and labor, and for switching cars by appellee for appellant to and from the shops of a company in Mt. Vernon engaged in the business of manufacturing and selling railroad cars. \* \* \* The amount recovered is made up of \$1250 for rent of the five miles of appellee's track between Drivers and Mt. Vernon, from December 1, 1890, to May 1, 1891; \$3069.67 rent of depots and terminal facilities at Mt. Vernon, and supplies, materials and labor furnished by appellee from October 4, 1890, to May 31, 1891; and \$1653.21 for switching cars by appellant to and from the Mt. Vernon Car Shops, from October 4, 1890, to November 10, 1891.

"The evidence shows that appellee furnished the trackage, depots, terminal facilities, supplies, materials and labor during the periods respectively above mentioned; that the prices charged, and so allowed by the jury, were correct, and in accordance with the terms of the foregoing contract, and that the respective amounts so allowed were due and unpaid to appellee when this suit was commenced. The evidence also shows that from October 4, 1890, to November 10, 1891, appellee switched to and from said car shops 1102 loaded cars,

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Opinion of the Court.

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charged two dollars per car, and during the same period in like manner 330 empty cars, for which it was charged 15 cents per car. It was proved, and not denied, that the charges so charged for switching were reasonable. The amount charged therefor was \$2369, but a credit of \$15.79 was allowed, because the switching of some cars, amounting to the latter sum, was improperly charged as the tonnage charge, and the credit was properly given to prevent a double charge for the same service, thus leaving \$2353.31, which was the amount allowed. It is contended on behalf of appellant, that this balance, due as a judgment, had been paid; but an examination of the whole record satisfies us it had not been paid, either in whole or in part.

Appellant, as we understand it, further insists that the facilities at Mt. Vernon included the track to the Mt. Vernon Works, and the switching of cars to and from the works should not be charged for, under the contract, as a separate and distinct item, at so much per car, but the expense of switching must be estimated upon the tonnage basis, as provided in said contract. Our construction of the contract is in favor of this interpretation. We must give it the meaning and intended by the parties at the time of its execution. The terminal facilities, as understood by those operating the railroad, do not include tracks other than those used for passenger trains, and the track put in upon the property of the works company was not used for that purpose, did not belong to the appellee, and was not a part of its terminal facilities. This appears by the testimony of Dickson, division superintendent of appellee,—a witness qualified, by his experience and knowledge of such matters, to testify what the parties understood terminal facilities meant; and we must give the words employed by the parties to the contract the meaning interpreted in accordance with such general understanding of railroad men. Moreover, at the time said contract

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Opinion of the Court.

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was executed the car works shops and tracks had not been built, nor, so far as appears by the evidence, was the building thereof then contemplated. We hold that said car works track was not a part of appellee's terminal facilities, and switching cars over it, to and from the shops, was a service separate and distinct from those services mentioned or included in the contract, and that appellee is entitled to recover the amount such separate service was reasonably worth.

"It is further insisted, on behalf of appellant, that even if the trackage, depots, terminal facilities, supplies, etc., were furnished, as claimed, under the contract, and cars were switched to and from said car works shops as claimed, and appellee could maintain a suit therefor, yet appellant was not liable, but the Louisville and St. Louis Railway Company would be, because it was the successor of the Jacksonville Southeastern Railway Company, and because appellant never owned or operated any *railroad* until February 1, 1891, but the Louisville and St. Louis Railway Company built the road from Centralia to Drivers, and in the summer of 1888 absorbed the Jacksonville Southeastern railway and became its successor, and thereafter operated the two roads from Jacksonville to Mt. Vernon, and because appellant had no contract with appellee, and never ran a train over its road.

"It will be seen by referring to the contract between the appellant and the Jacksonville Southeastern Railway Company, dated May 12, 1888, that the latter party agreed, on behalf of itself *and its successors* and assigns, to comply with the terms thereof by ~~it~~ to be performed,—among other things, to pay the rents reserved, and other charges, for the term of five years, beginning April 15, 1888, and ending April 15, 1893, and thereafter, until abrogated by one year's written notice given by the party desiring to terminate said contract. We have held in the case of *St. Louis and Cairo Railroad Co. v. East St. Louis and Carondelet Railway Co.* 39 Ill. App. 354, affirmed by the Supreme Court, (see 139 Ill. 401), that the right to op-

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Opinion of the Court.

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erate trains of one company over the railroad track of another necessarily includes the right to use the franchise of the latter, and such right could be lawfully leased by the owner of the railroad track to another corporation. And we also, in the case cited, held, that if, after a railway company has given a deed of trust upon its property and franchise, it leases from another company the right to use its track, and afterwards the deed of trust is foreclosed and the property and franchise are sold under the decree in foreclosure to a third company, which continues to use the leased track in the same manner the lessee had done, such purchaser so using the track is liable to pay the rent agreed to be paid by the lessee to the lessor, as provided in the contract, and is bound by the terms thereof. In the case at bar, if the record discloses the facts to be that the appellant was the successor of the Jacksonville Southeastern Railway Company, and used the track, depots and terminal facilities of appellee, and was furnished by it, and used, labor, materials and supplies, as charged, then appellant was liable to pay for the same in accordance with the terms of the contract, and was bound thereby the same as though it had executed the contract originally.

"We are satisfied the evidence warranted the jury in finding that appellant was the successor of the original lessee, and operated its trains over appellee's track, had the benefit of appellee's franchise, and the use of its depots and terminal facilities, and was furnished by appellee with labor, materials and supplies, in the same manner its predecessor had been; that the switching service charged as a separate item was performed by appellee for appellant, and the latter was liable therefor.

"Appellant was incorporated January, 1890, and the purpose, as shown by the articles of incorporation, was to lease or purchase, own and operate, a railway through the several named counties to Centralia. On July 1, 1882, the Jacksonville Southeastern Railway Company, then owning the railway

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Opinion of the Court.

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completed from Jacksonville to Litchfield, and desiring to extend it to Centralia, gave a trust deed, executed by its president, William S. Hook, to secure the payment of money loaned for the purpose of building such extension. The debt so secured was evidenced by the bonds of the company, and was, by the terms of the deed, made a lien on the railway from Jacksonville to Centralia, and all the corporate property and franchises then owned, or that were thereafter acquired, by the company. This deed of trust was foreclosed at the February term, 1890, of the Marion circuit court, and by virtue of the decree entered in that proceeding, the master in chancery sold all the mortgaged property to a committee, representing the mortgage creditors, who paid the full amount of their bid, except \$11,205 paid in cash, in the bonds secured by the trust deed, and received the master's deed for the property sold, October 4, 1890. On January 23, 1891, this committee, in consideration of the payment to them of \$1,187,200 in the first consolidated mortgage bonds of the appellant, conveyed all of said property to William Elliott, and he, on the same day, deeded all of said property to the appellant, in consideration of \$1,180,200 paid in said first consolidated mortgage bonds, and \$1,500,000 paid in the capital stock of appellant, and it became the owner of all the railway from Jacksonville to Centralia, and all the property and franchises the Jacksonville Southeastern Railway Company had formerly owned. This last named company ceased to exist on October 4, 1890, by reason of the sale then made of all its property, and we think the evidence in the record (which is not fully set forth in the abstract) justified the jury in finding that appellant became its successor on that date, and operated freight and passenger trains over the entire line from Jacksonville and Springfield to Mt. Vernon during all the period within which the indebtedness sued for had accrued.

"The circumstances attending the master's sale, the character of the payments made to him, the subsequent convey-



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Opinion of the Court.

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the bidders to Elliott and by him to appellant, both the same day, the fact that the mortgage bonds formed the entire consideration for the conveyance and a large part of the consideration for the conveyance to appellant, and the further fact that William S. Hook was president of the Jacksonville Southeastern Railway and one of the incorporators of appellant company, and on January 18, 1890,—one month before the said proceedings were commenced,—for the express purpose of purchasing the railway property and franchises as master, all indicate that the purchase was made, for appellant, in pursuance of a previous arrangement, to accept its mortgage bonds in payment of the debt secured by the deed of trust, and permit appellant, from the date of the purchase, to enter into the possession of and operate its railway that was sold. Furthermore, there is evidence tending to prove that William S. Hook was the president of appellant, and notwithstanding he denied the fact, the jury believed the witnesses for appellee, they could find that he was such president, and it is admitted that Marcus Hook was the auditor of appellant. It also appears that in this case a writ was served on Lutz as agent of appellee, and it is not denied he was its agent at Mt. Vernon. In addition to the evidence already mentioned, the evidence of Lutz and Dickson, the depositions of Knott and the letters of Marcus Hook, as auditor, attached thereto, the statements of William S. Hook and his correspondence as president, and that of Marcus Hook as auditor of appellant, with the officers of appellee, support the finding that from and after October 4, 1890, during the entire period within which the indebtedness accrued, appellant was the successor of the lessee in the property of April 15, 1888, claiming the same rights said to have been acquired thereby, and, as such successor, recognizing the contract as existing and binding upon it, used the

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Opinion of the Court.

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track and franchises of appellee between Drivers and Mt. Vernon, and its depots and terminal facilities there, and the labor, materials and supplies furnished by appellee, as charged, in operating its trains and carrying on its railway business, and that the switching service before mentioned was performed by appellee for the appellant, as claimed. The amount recovered, comprising the several items as set out in this opinion, was due and owing to appellee, and the jury rightfully found appellant liable therefor.

"We find no reversible error in the ruling of the court in admitting or refusing to admit evidence.

"The claim by appellant that the Louisville and St. Louis Railway Company was the successor of the lessee in said contract, and operated the trains over appellee's track, and used the terminal facilities, labor, supplies and materials furnished by appellee, is not supported by the evidence. The Louisville and St. Louis Railway Company owned no engines, cars or equipments and operated no trains.

"The first instruction given for plaintiff is as follows:

"'No. 1. If the jury believe, from the evidence, that the defendant is the successor of the Jacksonville Southeastern Railway Company, and as such successor came into the possession of the property, rights and franchises of the Jacksonville Southeastern Railway Company, and that the defendant, since it first came into possession of the railway formerly owned by the Jacksonville Southeastern Company, had been operating such railway and running its trains over the railroad of the plaintiff between Drivers station and Mt. Vernon and between Mt. Vernon and Drivers station, and using the terminal facilities of the plaintiff for freight and passenger business at Mt. Vernon, and has been furnished with supplies and materials and labor and services about the transaction of its business by the plaintiff while it was operating its trains over plaintiff's road between the places above mentioned, and defendant has claimed the right, under contract of April 15,

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Opinion of the Court.

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1888, between the plaintiff and the Jacksonville Southeastern Railway Company, to operate its trains over plaintiff's railroad between the places above mentioned, and to use plaintiff's terminal facilities at Mt. Vernon for the transaction of its freight and passenger business, then the defendant is liable to the plaintiff for whatever sum you find, from the evidence, to be due under the contract of April 15, 1888, for rent of track, terminal facilities, supplies and materials, labor and services furnished, if any, by the plaintiff from the time defendant first commenced to operate and run its trains over plaintiff's railroad until May 31, 1891.'

"Appellant complains of this instruction, and insists it was calculated to mislead the jury; that 'it was intended by the court that the jury should understand it as laid down as law, that the Jacksonville, Louisville and St. Louis Railway Company, by virtue of the several conveyances, thereby became liable to the Louisville and Nashville Railway Company.' We do not think the court gave the instruction with the intent the jury should so understand it, or that they did so understand it. On the contrary, nothing in the instruction conveys such meaning, but it is therein clearly stated that, to entitle plaintiff to recover *under the contract of April 15, 1888*, certain facts must be first proven. It was intended to inform the jury that plaintiff had a right to recover under the specific contract set up in said special count of the declaration, provided such proof was made. Evidence was introduced strongly tending to prove the several facts stated in the instruction, hence it was based on evidence, and the plaintiff was entitled to have it given to the jury as a correct proposition of law when applied to a certain state of fact.

"What has been already said will apply to the objections made by appellant to the second instruction given for plaintiff.

"The plaintiff's sixth instruction is more voluminous than was necessary, but was not calculated to mislead the jury. They must have understood by it, that if, from the evidence,

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Opinion of the Court.

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they found defendant, in conducting and carrying on its freight and passenger traffic, used the track of plaintiff between Drivers and Mt. Vernon, and its depot and terminal facilities there, defendant was liable to pay plaintiff, for such use and occupation, the amount they found, from the evidence, such use and occupation were reasonably worth. This was the law in that state of fact. Under the common counts plaintiff was not bound to prove a special contract in order to recover a reasonable price for the use and occupation of its property.

"Plaintiff's seventh instruction could not have prejudiced defendant, but imposed upon plaintiff the burden of proving the assignment to it of the contract of lease before it would be entitled to recover. This was requiring more of plaintiff than was necessary. If plaintiff and defendant recognized and acted under said contract as a valid and binding contract between them during the time defendant used and occupied plaintiff's property, no formal assignment of the contract was necessary to a recovery under it by plaintiff for a breach of its conditions.

"The refusal by the court to give the seventh, eighth, ninth and tenth instructions, asked for on behalf of defendant, is also assigned as error. The seventh had no proper application to the facts proven, and was properly refused. The eighth instruction was calculated to mislead the jury, and was not based on the evidence. It was not error to refuse it. The ninth instruction was misleading and superfluous. The jury had full and correct information given it by the court touching the same matters in the first, second and third instructions given on behalf of plaintiff, and it was not necessary to a fair trial that the same should be repeated. The court did not err in refusing to give defendant's ninth instruction. The tenth refused instruction does not state the law, as we understand it, and ought not to have been given.

Syllabus.

no reversible error in giving the instructions on plaintiff, or refusing to give those which the court give for defendant.

Judgment is affirmed."

no substantial error in the record, the judgment of the Court will be affirmed.

*Judgment affirmed.*

THE WORKINGMEN'S BANKING COMPANY *et al.*

v.

PHILIP WOLFF, Collector.

*Filed at Mt. Vernon June 19, 1894.*

**REVIEW—county board—reviewing, reducing or increasing the**

Under section 86 of the Revenue law, as amended in 1891, of the county board to review and reduce assessments on of individual property owners, so far as it applies to assessments prior to the fourth Monday of June, is purely appellate, and only when an appeal has been taken in the manner prescribed by the amendatory act. Any attempt by the county board to increase an assessment made prior to the fourth Monday of June, except from the town board of review, is without legal authority, and is void.

If the county board attempts to reduce assessments on which taxes have been assessed to it in the first instance, and not on appeal from the board of review, its action will be ineffectual, and such attempted reduction will not authorize an addition to the assessment of real property of a town to make up the alleged deficiency by such attempted reduction.

If a county board may equalize assessments, it has no power to reduce the assessment above or below the amount returned by the assessors, and if the aggregate assessment is raised above that which would be collected of the increased taxes on such assessment may be set aside in a court of equity.

If a county board acts illegally in changing assessments, its action is void, and it cannot ratify or change the legal acts of the assessors of the towns, or, if legally changed or vacated, the assessments are binding on the taxpayers.

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Brief for the Appellants.

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5. *SAME—county board—jurisdiction prior to 1891.* As the Revenue law stood prior to the amendment of June 17, 1891, county boards, in counties under township organization, had no appellate jurisdiction over the action of township boards of review, and no original jurisdiction to hear complaints of persons aggrieved by the assessment of their property, except in case of property assessed after the first Monday of June.

APPEAL from the Circuit Court of St. Clair county; the Hon. A. S. WILDERMAN, Judge, presiding.

Messrs. WISE & McNULTY, for the appellants:

Where an assessment of personal property is made by the local assessor at a certain valuation, and the amount is subsequently increased by persons without lawful authority, injunction will lie to restrain the collection of the taxes upon the increased valuation. *Glasford v. Dorny*, 2 Bradw. 521; *Cleg-horn v. Postlewaite*, 43 Ill. 428; *McConkey v. Smith*, 73 id. 313; *Bank v. Cook*, 77 id. 623; *Sivwright v. Pierce*, 108 id. 133; *Darling v. Gunn*, 50 id. 424; *Kimball v. Trust Co.* 89 id. 611.

All the property of the town of East St. Louis was assessed before the fourth Monday in June, 1892, by the local assessor. The town board of review met on the fourth Monday of June, and heard complaints, overruled the objections and sustained the local assessor. The county board, when it met, could only raise the assessments in two instances: First, when the property had been assessed after the fourth Monday of June; (*Coolbaugh v. Huck*, 86 Ill. 600;) second, when the owner had made application to the town board to have his assessment revised, and had given notice in writing to said town board that he would appeal from the decision to the county board. Rev. Stat. chap. 120, sec. 86.

The assessment made by the local assessor, and sustained by the town board, was the assessment for the township of East St. Louis, and when the county board attempted to revise the assessment by hearing the complaints and objections of persons who never gave notice in writing to the town board

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 Brief for the Appellants.
 

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would appeal from its decision, and, acting on such as and objections, revised the assessment by making it to the amount of \$589,984 on East St. Louis property. Such action was illegal. They had no power to hear and assessments by making such reductions. *Coolbaugh* 36 Ill. 600.

subsequent action in attempting to equalize by adding to East St. Louis property \$596,300, was also illegal. *Trust Co.* 89 Ill. 611.

personal property in the county being assessed at one per cent of its real value, the county board, in raising assessment one hundred per cent on complainants' personal property in East St. Louis township, and in raising the assessment on personal property in other townships in the county, violated the constitutional requirement of uniformity in taxation, and made the raise or excess. *Bureau County v. Railroad Co.* 44 Ill. 229; *Pelton v. U. S.* 143; *Cummings v. Bank*, *id.* 153; *Railroad v. Boone County*, 44 Ill. 240; *Law v. People*, 87 *id.* 385. The board's action, instead of equalizing, produced an inequity.

*Trust Co. v. Heston*, 83 Iowa, 378.

aggregate valuations, as made by the assessors of the townships, were \$13,141,422. This was raised to \$13,500,000, or a raise of \$11,580 over the aggregate assessments, or a raise of nearly nine-tenths of one per cent. In *Buck v. Board of Assessors*, 78 Ill. 560, a raise of a trifle over one-fourth of one per cent was sustained, but surely this large increase was unequal, and consequently illegal.

The county board deemed the assessment of the township of East St. Louis as unequal,—too high or too low,—they therefore ordered a new assessment, and instructed the assessors whether to increase or diminish the assessment. (at chap. 120, sec. 97.) The county board could not interfere in the province of the assessor, and practically make a new assessment, as they did.

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Brief for the Appellee.

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Mr. M. W. SCHAEFER, State's Attorney, for the appellee:

It is contended by appellants, that "when an assessment of personal property is made by the local assessor at a certain valuation, and the amount is subsequently increased," etc., injunction will lie,—citing a number of authorities. In answer to this we claim that the decisions do not meet the facts in this case, as there was no alteration or increase of individual assessments of the appellants; and furthermore, the decisions have been overruled in *Humphreys v. Nelson*, 115 Ill. 45.

There is no requirement of our statute, and no decision of any court, that requires any notice, to give the county board, at its July session, sitting as a board of equalization, power and jurisdiction to act. The Revenue act of our statute alone prescribes the duty of the county board when it is acting as a board of equalization.

The law is a public one, which prescribes the duties and designates the time of meeting of the board, and all citizens are bound to take notice of it. *Adsit v. Lieb*, 76 Ill. 198; *Porter v. Railroad Co.* id. 561.

This is all the notice required by the statute, and it is "due process of law," within the meaning of that term, so far as it is applicable to questions involved in the exercise of the power of taxation. *McMillen v. Anderson*, 95 U. S. 37; *State Railroad Tax cases*, 92 id. 575; *Kentucky Railroad Tax cases*, 115 id. 521.

If a board of supervisors acts illegally in changing assessments, it will not vitiate, alter or change the legal acts of the assessors of the towns. Until legally changed or vacated their assessments are binding on tax-payers. *State v. Allen*, 43 Ill. 456.

These appellants, before they can have any standing in a court of equity, must first do equity. They should have paid the amount due according to the original assessment, or tendered it to the collector. This is not alleged in the bill of



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Opinion of the Court.

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and does not appear in the testimony. The allegation that they are ready and willing to pay is not sufficient.

ICE BAILEY delivered the opinion of the Court:

A bill in chancery, brought by the Workingmen's company and various other parties, all tax-payers of East St. Louis, in St. Clair county, against the township assessor, and Arthur W. Herr, county clerk, to restrain the collection of a portion of the taxes upon the personal property of the complainants for 1892. The facts appearing by the pleadings and in substance, as follows:

In the year 1892, the personal property of the complainants was assessed by the township assessor, the assessment of not only the personal property, but of all the property in the township, was completed and returned by the assessor prior to the first day of June of that year. The valuations placed upon the complainants' property were satisfactory to them, and at a meeting of the town board of review, which convened on the fourth Monday of June, 1892, the complainants, personally, went before the board for the purpose of ascertaining whether any complaints had been filed by other parties. The board found that the assessments were too low, but found none, and no objection to the assessments was made by the town board. The complainants, by their bill, allege and admit, that they were satisfied with the assessments so made and confirmed, and were ready and willing, and by their bill offer, to pay the taxes assessed upon the assessment of their personal property by the assessor.

Other persons, however, appeared before the town board and filed objections to the assessments against their property, but those objections were all overruled, and the assessments for the town was returned to the county clerk prepared by the township assessor. It does not appear by the bill that the parties filing objections to their assessments,

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Opinion of the Court.

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gave notice in writing to the town board, that they would appeal from its decision to the county board.

The county board met on the second Monday of July, as provided by statute, and at that meeting, the matter of the equalization of the assessments made by the various township assessors of the county came before the board. A large number of objections and complaints in respect to individual assessments were presented to the board by various of the parties assessed. The objections and complaints thus presented embraced most if not all those which had been filed before the town board, together with many others which seem to have been presented to the county board in the first instance. These various individual complaints, as well as the matter of equalizing the assessments between the towns, were referred by the board to its committee on equalization, and that committee afterwards submitted its report, in which it stated, among other things, that a large number of appeals from the different boards of review had come before it, and that the several complaints made had been investigated, and that the committee had spent one day in East St. Louis, in order to personally inspect the several tracts of land where complaints as to the assessments had been filed, and the committee found it necessary, and were compelled, in order that justice might be done, and that the assessment might be properly equalized, to make several sweeping reductions. The committee thereupon recommended a large number of reductions in the assessments upon particular tracts of land, some of the reductions being of very large amounts. Most of the tracts upon which the assessments were thus reduced were situate in the town of East St. Louis. The total amount of reductions thus made on complaint of individual owners of the tracts of land assessed was \$649,049. Other reductions were recommended of certain rates per cent upon the assessments of the lands and town lots in various towns of the county, sufficient to increase the aggregate reductions to \$773,375.

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Opinion of the Court.

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To balance these reductions, so as not to reduce the aggregate assessment of the county, an addition was made of various rates per cent to the assessed valuation of the lands and town lots in various of the towns in the county, and it was further recommended that an addition of one hundred per cent be made to the assessment of the personal property in the town of East St. Louis, the aggregate of the last item of increase being \$345,065, and the aggregate of all the increase in the various assessments thus recommended being \$784,702. The report of the committee on equalization was adopted by the county board, and the taxes for the year 1892, were subsequently extended upon the assessment as thus equalized. In this way the taxes upon the complainants' personal property for that year were doubled, and the present bill was brought to enjoin the collection of the taxes extended upon the increased valuation thus placed upon their property.

The cause was heard in the court below on pleadings and proof, and at such hearing, a decree was rendered dismissing the bill for want of equity. To reverse that decree, the complainants have appealed to this court.

It is contended that the county board, in sustaining the complaints of individual property-owners and reducing their assessments, acted without jurisdiction or lawful authority, and, consequently, that such reductions in the assessments were void, and it is argued that the increase of the assessment upon the personal property in East St. Louis one hundred per cent—an increase necessitated and justified only by such reduction—was also void.

As the revenue law stood prior to the amendment of June 17, 1891, (Laws of 1891, page 187,) county boards in counties under township organization, had no appellate jurisdiction over the action of township boards of review, and no original jurisdiction to hear complaints of persons aggrieved by the assessment of their property except in case of property assessed after the first Monday in June. By section 86, of

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Opinion of the Court.

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chapter 120, of the Revised Statutes, as that section stood prior to the amendment, town boards, in counties under township organization, were required to meet on the fourth Monday in June, for the purpose of reviewing the assessment of property in their towns, and they were authorized and required, on application of any person considering himself aggrieved, or who should complain that the property of another was assessed too low, to review the assessment, and correct the same as should appear to be just. And it was further provided that property assessed after the fourth Monday in June should be subject to complaint to the county board, under the same rules prescribed in that section. No provision, however, was made in that section, or in any other portion of the statute so far as we are aware, for an appeal from the determinations of the township boards to the county boards.

By section 97, the powers and duties of the county board are prescribed. These are, in brief, (1) to assess all such lands or lots as have been listed by the county clerk, and not assessed by the assessor; (2) "On the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment, and correct the same, as shall appear to be just;" (3) to hear and determine the application of any person who is assessed on property claimed to be exempt from taxation; and (4) to equalize the assessments between the several towns of the county. The power granted to county boards under the second of these specifications, as held in *Coolbaugh v. Huck*, 86 Ill. 600, is limited to assessments made after the fourth Monday of June, that is, after the town board of review has commenced its session, no power being given county boards to review individual assessments made prior to that date.

By the amendatory act of June 17, 1891, it is provided that property assessed after the fourth Monday of June, and all other property whereof the owner or his agent has made ap-

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Opinion of the Court.

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plication to the town board to have the assessment on the same revised as provided by section 86, and has given notice in writing to the town board that he will appeal from its decision to the county board, shall be subject to complaint to the county board, and the county board shall revise and correct the assessment, and if it shall appear that it has been assessed higher in proportion than other lands in the same neighborhood, the county board shall revise and correct the same, and make such reduction as shall be just and right.

Under this section, it is plain, that the power of the county board to review and reduce assessments on complaint of individual property owners, so far as it applies to assessments made prior to the fourth Monday of June, is purely appellate, and can arise only where an appeal has been taken in the manner prescribed by the amendatory act. It follows that any attempt by the county board to review or reduce individual assessments made prior to the fourth Monday of June, except on appeal from the town boards of review, is without legal authority, and is consequently inoperative and void.

In the present case, it affirmatively appears, that a large number of the complaints upon which the assessments were reduced, were presented to the county board in the first instance, and in those cases where applications had been made to the town board for a review of the assessment, it does not appear that any appeal was taken or prosecuted from the decision of the town board, in the manner prescribed by the statute, but the evidence seems to show affirmatively that in those cases, the same complaints were renewed before the county board, without the formality of taking an appeal. Such being the case, it is difficult to see upon what principle the action of the county board in reducing the assessments upon such complaints to the aggregate amount of \$649,049 can be sustained. The county board having no power to make these reductions, its attempt to do so was ineffectual, and there was therefore no valid reduction of the aggregate assess-

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Opinion of the Court.

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ments of the county which necessitated or justified the addition of one hundred per cent to the assessment of the personal property in the town of East St. Louis.

If a county board acts illegally in changing assessments, its action will not vitiate or change the legal acts of the assessors of the towns, and until legally changed or vacated, the assessments are binding on the tax-payers. *State v. Allen*, 43 Ill. 456. It follows that the assessments which the county board have attempted, without authority, to reduce, remain unaffected by their action. By the provisions of section 97 of the Revenue Act, the county board, in equalizing the assessment, was expressly prohibited from reducing the aggregate valuation of all the towns below that fixed by the township assessors, and they were also prohibited from increasing the aggregate, except in such amount as might be actually necessary to a proper and just equalization. But the assessments which the board had attempted to reduce being unaffected by their action, the aggregate produced by the addition of one hundred per cent to the personal property assessment of East St. Louis, is greatly increased above that produced by the original assessments.

In *McConkey v. Smith*, 73 Ill. 313, it was held that a county board may equalize assessments, but has no power to raise the assessment beyond the amount returned by the assessors, and if it does so, the collection of the assessment will be enjoined by a court of equity. Upon this principle, we think that the complainants are entitled to an injunction restraining the collection of the taxes extended upon the increased valuation of their personal property.

For the foregoing reasons, the decree will be reversed, and the cause will be remanded, for further proceedings in conformity with this opinion.

*Decree reversed.*

## THE UNION STOCK YARDS NATIONAL BANK

v.

GEORGE W. DUMOND.

*Filed at Ottawa June 19, 1894.*

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olves precisely the same questions as the case of *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646, and must be governed by that

in the Appellate Court for the First District;—  
 court on writ of error to the Superior Court of  
 the Hon. JOSEPH E. GARY, Judge, presiding:

CKHAM & BROWN, for the appellant.

J. CRAWFORD, for the appellee.

μ: The facts in this case, except dates, parties  
 unt of recovery, are in all essential particulars  
 h those in *Drovers' Nat. Bank v. O'Hare*, 119 Ill.  
 oisely the same questions are presented for our  
 n. If the case was one of first impression in this  
 ould feel disposed to give greater weight to cita-  
 ment of counsel than we can now do. We have  
 nsideration to the matter which the importance  
 n demands and the very able argument of counsel  
 are not inclined to recede from the holding in that

tted by counsel that every question here involved  
 d in the *O'Hare case*, and if that is adhered to, as  
 st be done, it is conclusive of this case. It fol-  
 arily, that upon the authority of the *O'Hare case*  
 it must be affirmed, and it is accordingly so done.

*Judgment affirmed.*

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY

v.

THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

*Filed at Mt. Vernon June 19, 1894.*

**RAILROAD**—*liability, on contract to transport engine of another company.* Where one railway company undertook to transport a locomotive of the plaintiff railway company to a certain point over its road, and the locomotive was placed on the defendant's road in charge of its conductor, and a fireman and engine-driver of the plaintiff operated the engine under the control of such conductor, their duties being merely mechanical, and they having no authority to say when the engine should start or at what station it should be side-tracked to allow trains of the defendant to pass, it was *held*, that if the engine was injured and destroyed while being transported, through the negligence of the defendant's conductor, the defendant was liable to the plaintiff for the loss.

**APPEAL** from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Bond county; the Hon. B. R. BURROUGHS, Judge, presiding.

This was an action brought by the Chicago, Peoria and St. Louis Railway Company, against the Terre Haute and Indianapolis Railroad Company, to recover for the loss of a locomotive engine in a collision which occurred on the defendant's road on the 21st day of May, 1892. A trial in the circuit court resulted in a judgment in favor of the plaintiff for \$3207.48, which, on appeal, was affirmed in the Appellate Court.

It appears from the record that on the 20th day of May, 1892, the appellee had two locomotive engines at East St. Louis, which, owing to high waters and wash-outs, it was unable to get out over its own line of road, whereupon application was made to appellant to transfer them over its road to Smithboro. An agreement was consummated by telegraphic correspondence, under which appellant agreed to run the engines from East St. Louis to Smithboro, over its road, for fifty cents per mile. Under this arrangement, on the morning



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Statement of the case.

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of May 21, 1892, engine No. 49 was placed on appellant's track at East St. Louis to be run to Smithboro. Appellant placed C. H. Smith, a conductor in its service, upon the engine to pilot or conduct it from East St. Louis to Smithboro. Foote, an engine-driver, and Benson, a fireman, both in the service of appellee, were placed on the engine to act in the capacity of engineer and fireman on the trip. After the engine left East St. Louis, at Highland station, the following order was received:

*"Special Order No. 1122.*

*FROM TERRE HAUTE, May 21, 1892.*

*"Conductor and Engineer J. S. E. 49:*

*"You have until five thirty (5:30) A. M. to run to Greenville against No. nine (9). Meet and pass No. twenty-nine (29) at Greenville.*

*R. B. W.*

*"Correct, 4:58 A. M.—Smith.—Foote."*

The engine got somewhat out of order, so that Greenville was not reached on time, and a stop was made at Pocahontas for from fifteen to twenty minutes to repair the engine, at which place No. 9 passed, going west, some nine miles distant west from Greenville. It seems that the engineer had no time table. Neither he nor the fireman had been over the road of appellant before, and knew nothing about the time of the trains. The conductor, Smith, had a time table, had been regularly running on the road, and knew the running time of the trains. As soon as No. 9 passed Pocahontas, going west, the conductor threw the switch and gave the engineer the signal to back out, and the run was commenced for Greenville, some nine miles distant. After going about three miles, along which there were several curves in the road, just after passing one of them a head-end collision occurred, about six o'clock A. M., with engine No. 17, drawing the "Diamond Special," a passenger train, which resulted in the demolition of engine No. 49. It appears from the evidence of the conductor,

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Opinion of the Court.

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Smith, that he knew that No. 9 was due at Greenville at 5:20 A. M., and that No. 17,—the Diamond Special,—was due there at 5:32 A. M.,—only twelve minutes thereafter. He was asked these questions: Q. "Well, now, you knew about its time (the time of No. 17, the Diamond Special,) at that time?" A. "I knew about it, but had forgotten it." Q. "You did not mention it to the engineer or fireman?" A. "No, sir." Q. "Who had control now of the engine this time in leaving and pulling out, if any one?" A. "I directed the movement of the engine."

Mr. W. H. DOWDY, and Mr. T. J. GOLDEN, for the appellant.  
Messrs. MORRISON & WORTHINGTON, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This action was brought by appellee to recover for the loss of an engine, destroyed, as is alleged, through the negligence of the defendant, the appellant here. The appellant contracted with appellee to transport the engine over its road from East St. Louis to Smithboro for the sum of fifty cents per mile, appellee to furnish on the engine an engine-driver and fireman. The appellant received the engine on its line of road at East St. Louis, placed it in charge of a conductor, who had the management and control of the transportation from the point where it was received, to Smithboro, where, by the contract, it was to be delivered. There is no question in regard to the fact that the engine was destroyed through the negligence of those who controlled its running from East St. Louis to Smithboro, but it is contended that the entire management and control of the engine were in the hands of appellant, while, on the other hand, it is contended by the defendant that the engine was under the joint control of the servants of the plaintiff and defendant, and that the engine was destroyed through the joint negligence of the servants of the plaintiff and defendant.

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Opinion of the Court.

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Under the contract entered into between the two parties, it is plain that the appellant gave the appellee no power or authority to run its trains or engines over the road of appellant. There was no leasing of appellant's line of road for the purpose of allowing appellee to run an engine over any portion of appellant's road. Indeed, appellee had nothing to do with the transportation of the engine over appellant's road. It is true that appellee, when it delivered the engine to the appellant to be transported, furnished a fireman on the engine, whose duty it was to keep up proper fires, and an engine-driver to operate the engine. But the duties of these two parties were merely mechanical. They had no authority to say when the engine should start, what time it should make, where it should stop, or at what station it should be side-tracked to allow trains to pass. These were matters with which the engineer and fireman had nothing to do, and over which they had no control. These matters were in the hands of the conductor of the engine, assigned to that duty by appellant, and he was under the direction of appellant's train dispatcher. Thus the entire management and control of the engine in its transportation were in the hands of the appellant, and if loss occurred through the negligence of the servants of appellant in transporting the engine, no reason is perceived why appellant should not be held responsible for that loss. Had the conductor who controlled the running of the engine obeyed the order of the train dispatcher the collision would not have occurred. But he failed to do so.

In the argument some importance is sought to be attached to the fact that the order from the train dispatcher was directed to the conductor and engineer on the engine, but we do not regard that a matter of any special importance. The engineer had never been over the road before. He had no time card, knew nothing about the running of trains on the road, and relied entirely upon the conductor as to the running of the engine. When the engineer was directed by the conductor to

## Syllabus.

leave Pocahontas, he had no reason to suppose there was any danger of meeting a train, and so far as he had any knowledge there was no reason why he should refuse to obey the order of the conductor. But if it was the duty of the engine-driver to ascertain what the orders of the train dispatcher as to the running of the engine were, and if he was negligent in that regard, these facts would not prevent a recovery, for the reason that he had no voice whatever in the control of the engine. He was in charge as a mere operator of the engine, as directed by the servants of appellant.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THE CITY OF EAST ST. LOUIS

v.

THERESA ALBRECHT *et al.*

Filed at Mt. Vernon June 19, 1894.

1. SPECIAL ASSESSMENTS—*for improvement already made.* A city can not, by accepting and adopting an improvement of a street, compel property owners to pay for it by special assessment or special taxation. The statute does not contemplate that the city council shall go on and make the improvement, and after it is completed levy and collect a special assessment or tax to pay for the same.

2. The first step to be taken in making a local improvement to be paid for by special assessment, is the passage of an ordinance specifying the nature of the proposed improvement, and the mode in which the cost thereof shall be collected; and until such ordinance is passed, as required by the statute, no work can be done or expense incurred which can become a charge on the property of the land owner.

3. Where the improvement has been ordered by ordinance, and the assessment has been annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made as provided in section 46 of article 9 of the City and Village act. In such a case the existence of an ordinance when the work was done is the basis of the re-assessment; and even when the original ordinance proves defective, and insufficient to support an assessment, yet if not absolutely void it may be amended, or the defect cured by a supplemental ordinance, and a re-assessment made.

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Opinion of the Court.

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APPEAL from the County Court of St. Clair county; the Hon. W. H. KROME, Judge, presiding.

Messrs. CONKLING & GROUT, and Mr. F. G. COCKRELL, for the appellant.

Mr. JESSE M. FREELS, and Mr. CHARLES P. KNISPFL, for the appellees.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This was an application by the city of East St. Louis for confirmation of a special assessment to pay for improving Broadway, one of its streets. A former assessment for the same purpose was before us at a previous term, and held invalid, the opinion being filed January 24, 1891. (*St. John et al. v. City of East St. Louis*, 136 Ill. 207.) On the 12th of June following, the city council passed an ordinance, under which this assessment was made, which, on objection by appellees, the court below refused to confirm.

The principal question raised by the objections filed is, whether the ordinance of June 12, 1891, is sufficient to authorize the assessment. It is entitled "An ordinance for the grading, paving and sewerage of Broadway, of second St. Clair subdivision of the city of East St. Louis, and for the payment of said work." It then recites, that whereas the city council had, on the first day of June, 1889, passed an ordinance known as No. 583,—setting out the ordinance at length, and the proceedings had thereunder to the confirmation of the assessment reviewed in *St. John v. East St. Louis*, *supra*. It also recites, that, whereas, ordinance No. 586 was afterwards passed, which partially changed and interfered with carrying out the character of said improvements as originally contemplated by ordinance No. 583, etc., stating the manner in which it so interfered; and further recites: "And whereas, by reason of the change above named, Broadway, of the second St. Clair subdivision, has been, in compliance with the provi-

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Opinion of the Court.

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sions of ordinance No. 583, paved in the center thereof forty-eight feet in width from the easterly line of Third street to the southerly line of the St. Clair county turnpike, as provided in said ordinance No. 583, and by reason of the change therein caused by said ordinance No. 586, from the west line of Third street has been paved sixty-four feet in width, west a distance of twenty feet, and from thence west has been paved fourteen feet in width on each side of said viaduct approach for a further distance west of one hundred and twenty-four feet, and from this point to the easterly line of the right of way of the St. Louis, Alton and Terre Haute Railroad Company fifty-six feet in width, except on the space covered by said stone pillars, and all the rest of the work provided for in ordinance No. 583 having been done, carried out, performed and completed in conformity with and as shown by the maps, profiles, plans and specifications of said work on file in the office of the city clerk of said city, and bearing the same number as this ordinance; and whereas, all of said work has been done by the city in good faith, and in contemplation of the collection of a special assessment, to be levied as provided in sections 18 to 48, inclusive, of article 9 of an act of the General Assembly of the State of Illinois entitled 'An act to provide for the incorporation of cities and villages,' approved the 10th day of April, A. D. 1872, and the amendments since made thereto; and whereas, the cost of said improvement, completed, as shown upon the plans, maps, profiles and specifications on file in the office of the city clerk, as aforesaid, has been \$51,800.40, of which sum the city, by general taxation and out of its general revenues, has paid the sum of \$12,827.60, including the sum of \$2142 which was assessed against it by said commissioners, and the further sum of \$23,096.59 having been paid into the city treasury by property owners, as shown in this ordinance, and by the city paid out upon the cost of the improvement shown by said plans, maps, profiles and specifications, which sum was paid by the following own-

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Opinion of the Court.

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ers of the following described lots, blocks and parcels of land, to-wit: \* \* \* and there now being a balance of \$15,876.21 still due and unpaid upon the improvement described in the plans, profiles, maps and specifications above referred to and on file in the office of the city clerk, and bearing same number as this ordinance, which work was done by the city in good faith, and in contemplation of the cost thereof being paid by special assessment, as provided by law; now, therefore," etc.

After these statements of what had already transpired, it proceeds:

*"Be it ordained by the City Council of the City of East St. Louis:*

"Section 1. That the local improvement made on Broadway by grading, paving and sewerage, as shown upon and by the maps, plans, profiles and specifications of said completed work now on file in the office of the city clerk of said city, and bearing the same number as this ordinance, be and the same is here adopted, accepted, and its completion in the manner actually done, ratified by the city of East St. Louis."

Section 2 provides that the improvement shall be paid for by special assessment on property benefited, and by general taxation. Section 3 orders the assessment to be made under proceedings in accordance with sections 18 to 48. Section 4 appoints a committee to estimate the cost of the improvement, and also provides that "said committee shall also ascertain and report, in writing, the additional cost, if any, of the changes made in this improvement from that originally contemplated in ordinance No. 583. Said committee shall also ascertain and report, in writing, what amount has been paid by the city, if any, upon the complete improvement specified in section 1 of this ordinance, and the amount which has been paid in on said improvement by the owners of the property heretofore assessed under ordinance No. 583, and the actual amount which is necessary to pay the balance due for said

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Opinion of the Court.

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finished improvement, together with the cost of the assessment proceeding herein provided for."

It will thus be seen that this ordinance does not pretend to authorize the grading, paving and sewerage of the street, for the payment of which it attempts to levy a special assessment. It simply adopts and accepts the improvement theretofore made, and at the same time shows on its face, as was held in the *St. John case*, that the ordinance under which the work was done was invalid. It shows on its face that all that part of the improvement west of Third street was made without any ordinance whatever authorizing the same. We held in the *St. John case*, that whatever authority had been given for paving that part of Broadway by ordinance No. 583, was taken away by the adoption of No. 586. Moreover, as is shown in that case and is recited in this, ordinance No. 583 did not authorize any such improvement as was actually made from Third street west.

The question presented, then, is, can a city council, under our statute authorizing the making of local improvements by special assessment or special taxation, by accepting and adopting improvements made without being authorized by ordinance, compel property owners to pay for them.

In *City of Carlyle v. County of Clinton*, 140 Ill. 512, after citing sections 1, 2, 17 and 19, we said: "From these sections of the statute it is apparent that when a city undertakes to make a public improvement, the cost of which they expect to raise by special assessment or special taxation, the first step to be taken is the passage of an ordinance. The ordinance lies at the foundation of the proceeding, and unless an ordinance is passed there is nothing upon which the proceeding can rest. Section 1 confers power to make local improvements by special assessment or special taxation, as the city authorities shall by ordinance prescribe. This language does not contemplate that the city council shall go on and make the improvement, and, after it is completed, levy and collect



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Opinion of the Court.

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assessment or tax to pay for such improvement. section 19 in plain words declares, whenever the improvements, in whole or in part, are to be made by assessment, the council shall pass an ordinance to in which shall be specified the nature, character, and description of the improvement. This language in this case it was disregarded. The improvement made without an ordinance, but after it was contemplated was made to comply with the law by the passage of an ordinance, not to make an improvement, but to authorize an already made. In addition to the sections already mentioned, section 20 requires the committee appointed to estimate the expense, to make an estimate of the cost of the improvement contemplated by such ordinance; and section 21 requires the petition addressed to the county court shall contain an ordinance for the proposed improvement. These

provisions of the statute are plain, and all point in one direction. The first step to be taken when a local improvement is to be made, and to be paid for by special assessment or taxation, is the passage of an ordinance by the city council. Until an ordinance is passed, as required by the statute, no work can be done or expense incurred which can be charged on the property of the land owner."

This is decisive of this. Here, as there, an ordinance was passed not to make an improvement, but to pay for one already made. One of the controlling reasons for requiring an ordinance to be passed prior to making the improvement is to specify in the ordinance the nature, character, locality and description of the improvement, which the statute requires every such ordinance to contain. It is an intelligent estimate of the cost of the material, and the expense to be made, both as a protection to owners of property and as a restraint upon the municipal authorities. (*Wheeler v. County of Clinton, supra.*) It seems too clear to require an ordinance, that without overruling that decision, and the decision in support of it, and also that of *St. John v. City*

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Opinion of the Court.

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of *East St. Louis, supra*, the judgment of the county court refusing to confirm the assessment in this case must be affirmed, upon the ground that the improvement, for the payment of which it was levied, was never authorized by ordinance.

It need only be observed, this case is wholly unlike those in which it has been held that where the improvement has been ordered by ordinance, and the assessment has been annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made, as provided in section 46, article 9, of the City and Village act. In those cases the existence of an ordinance when the work was done is the basis of the re-assessment. Even where the original ordinance proves defective, and insufficient to support an assessment, yet, if not absolutely void, it may be amended, or the defect cured by a supplemental ordinance, and a re-assessment made. But no such thing is attempted in this case, or could be done. Here, after adopting an ordinance authorizing a certain improvement, the city council deliberately repealed it as to a large part thereof, and proceeded to make an entirely different improvement, and now seeks to enforce the collection of a special assessment to pay for the work by simply passing an ordinance adopting and accepting the improvement. To say that the city adopted and accepted the work or ratified what had been done, was an idle ceremony, and amounted to no more than approving its own act. The invalidity of the former assessment did not arise from a repudiation of or refusal to accept the work, but because property holders insisted that it was illegally done, and that contention was sustained by this court. That objection still remains.

• The judgment of the county court will be affirmed.

*Judgment affirmed.*

MOSHER T. GREENE *et al.*

v.

PEOPLE *ex rel.* Charles W. Pavay, Auditor.*Filed at Ottawa June 19, 1894.*

ON—*individuals usurping corporate powers.* An association of persons in the business of insurance, by professedly its liability to the amount of money contributed by each, agreeing to give perpetuity to the business by making memberships transferable by the assignment of the member or his representatives, will thereby act as a corporation, and will be subject to the judgment of ouster. And the fact that such persons may be usually liable upon policies of insurance which they may will not relieve them of the charge of having acted as a

from the Circuit Court of Cook county; the Hon. Chief Justice, Judge, presiding.

SMITH & PENCE, and Mr. JOHN M. HARLAN, for the

ARGUE HUNT, Attorney General, for the appellee.

AM: Petition for rehearing having been granted, has again been subjected to consideration. While, in an opinion treating of the points made by the petition with propriety be filed, it could serve no good purpose the same conclusion must, in the end, be reached. We re-adopt the opinion of Mr. Justice SCHOLFIELD in opinion of the court, and it will be refiled accordingly: SCHOLFIELD, J.: "The question here is, whether, under the facts stated by this record, 'any association or number of persons acting within this State as a corporation without being legally incorporated.' If they are, the judgment below affirmed by our statute entitled 'Quo Warranto,' (chap.

0 LLL.

## Opinion of the Court.

112, Rev. Stat. 1874, p. 787,) and must be affirmed, otherwise it must be reversed.

"We think it clear that in two respects, at least, these respondents are acting as a corporation, and it is not pretended that they are, actually, incorporated, namely: First, in professedly limiting their liability to the amount of money contributed by each; second, in assuming to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives. It may be, as contended by counsel, that individuals may insure property against loss by fire. They can not limit their liability to any given amount of capital they choose to set apart for that purpose, nor can they perpetuate the business, without change of capital, beyond their own lives, indefinitely. These things can only be done by a corporation. Angell & Ames on Corporations, (9th ed.) sec. 41; 2 Kent's Com. (8th ed.) 296, \*268; Parsons on Partnership, p. 544; Gow on Partnership, (2d Am. ed.) 17.

"The fact that these respondents may be legally held individually liable upon any policies they may have issued, does not relieve them of the charge of having acted as a corporation. They are, if individually liable, only liable because they have no statutory authority to do what they have assumed to do,—because, instead of being a corporation in fact, they have usurped the powers of a corporation. Were we to hold that these respondents can do, without any legislative authority, what they here assume to do, our insurance laws ought to be repealed, for individuals then, by organizing in this manner, could escape both individual and corporate liability beyond the amount of assets they might choose to place in the hands of their trustee as the basis of their liability. No public officer could investigate whether the amount is in fact paid in, how it is invested or how secured, and the public would thus have practically no protection against dishonest companies. These respondents, if they will carry on the business

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Syllabus. Opinion of the Court.

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re, must either openly act upon their responsibility, als, or they must become incorporated, and subject to the laws governing such corporations. Judgment is affirmed."

*Judgment affirmed.*

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GEORGE W. DUMOND

v

THE MERCHANTS' NATIONAL BANK.

*Filed at Ottawa June 19, 1894.*

is governed and controlled by *O'Hare v. Drovers' National* l. 646.

from the Appellate Court for the First District;—  
that court on appeal from the Superior Court of Cook  
the Hon. JOSEPH E. GARY, Judge, presiding.

PECKHAM & BROWN, for the appellant.

A. OTIS, for the appellee.

AM: This is a suit by appellant, against appellee, Merchants' National Bank, for the recovery of the same recovered in *Union Stock Yards Nat. Bank v. Dumond*, in which an opinion has been filed affirming a judgment in favor of appellant and against the last named bank. In the opinion the doctrine of *Drovers' Nat. Bank v. O'Hare*, 146, was approved. Appellee, the Merchants' National Bank, occupies the same position in this case that the Union Stock Yards National Bank did in the *O'Hare case*, and it follows, upon the authority of that case and the judgment in *Union Stock Yards Nat. Bank v. Dumond*, that the judgment in favor of appellee must be

*Judgment affirmed.*

## Syllabus.

LEANDER J. McCORMICK

v.

THE SOUTH PARK COMMISSIONERS.

*Filed at Ottawa June 19, 1894.*

150	516
151	206
150	516
173	248
150	516
176	25

150	516
201	7407
201	4408

1. **PARK COMMISSIONERS—powers over parks.** The act of 1869, relating to parks, invested the park commissioners with powers, generally, at least, as full and exclusive in regard to the parks as those conferred upon and possessed by the city council of Chicago in respect to public squares and places in the city, each holding by the same kind of tenure, in relation to the respective subjects matter there referred to, the one clothed with powers identical in extent with those vested in the other.

2. **SAME—control of streets leading to parks.** Prior to the act of 1879, park commissioners were not vested with authority to acquire the management and control of public streets leading to parks. The city held the fee in the streets in trust for the public, and had no power to surrender a street to the park commissioners or other person or body.

3. By this act power was conferred upon park commissioners to take and accept public streets of a city connected with parks, and to assume the management and control of the same, and power was given city authorities to consent thereto, and to surrender the same to the park boards, regardless of where the fee therein might be lodged.

4. **SAME—powers as to encroachments on streets.** After the park commissioners have, by the consent of the city authorities, acquired the control of streets leading to their park, they may prohibit the erection of a balcony which encroaches upon such street, and the city council will have no power to license such encroachment.

5. **SAME—limit and extent of powers.** The authority of the park commissioners ceases at the line on either side of the street. As to the character, height or dimensions of buildings, or of what materials they shall be constructed, along the line of the street, they have no control; but so far as the street proper is concerned, they have the same power as is vested in them of and concerning the parks, boulevards and driveways under their control, subject only to the reservation made by the city in its ordinance giving control of the street.

6. As to encroachments upon the park, and obstructions or purpures in the streets, boulevards or driveways thereof, the park commissioners are invested with power, ample and complete, to prevent and to remove the same. As to streets leading to parks placed in their control, they may exercise any of the powers conferred by the act of 1869, or which may be by law vested in them, of and concerning parks, boulevards or driveways under their control, so far as applicable.

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Statement of the case.

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*TS—power of legislature to change the control.* The power of the legislature over the public streets, when private rights will not be affected, to change the possession and control of the same, can not be questioned.

*—private use of part of street.* The owners of lots bordering a public street or ways have the right to make all proper and reasonable use of a part of the street for the convenience of their lots, not inconsistent with the paramount right of the public to the use of the street and its parts.

The absence of legislative direction or municipal declaration of the rights shall be, what is to be deemed a reasonable and proper use will depend, in a large degree, upon the public usage in the city and upon the local situation. General use by the lot owners and acquiescence therein by the public and public authorities, may be resorted to as evidence of what is a reasonable and proper use and of the existence of the right.

from the Circuit Court of Cook county; the Hon. JUDGE LEY, Judge, presiding.

as a bill in chancery in the circuit court of Cook county brought by appellant, to restrain appellee, the Board of South Park Commissioners, from interfering with the construction, by appellant, of a balcony in front of his hotel located on Michigan avenue, in the city of Chicago. The bill shows the organization of the Board of South Park Commissioners as a municipal corporation under the acts of the legislature of 1869; that the city of Chicago granted, by an ordinance of June 23, 1879, to said board, power "to take, control and improve Michigan avenue, extending from the south line of Jackson street to the south line of Fifth street;" that said board took possession of said portion of Michigan avenue, and has since regulated, controlled and improved the same; alleges said board to have no authority in reference to said portion of Michigan avenue other than that conferred by the said acts of the legislature and the ordinance of the city of Chicago; that the ordinances of the city of Chicago provide that "porticos to any building, extending through one or two stories, may have their plinths

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Statement of the case.

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extend four feet over the building line;" that said word "plinth," in said ordinance, means the lowest division on the base of a column, or the plain projecting face at the bottom of a wall immediately above the ground; alleges the ownership in fee of complainant in the land occupied by said hotel building; the erection, many years before, of said building, with the Michigan avenue entrance thereto so constructed, by consent of the city authorities, as to extend two and a half feet over the lot line; that complainant, for convenience, ornamentation, fire escape, etc., proposed to, and did, erect a balcony or portico above the entrance of his said building, resting the same upon the pillars supporting said entrance, the arch of the balcony being supported by iron beams from the wall of the building, said balcony to be sixteen feet above the surface of the street, and projecting out over the lot line some six feet; that said board of park commissioners having refused complainant any permit to make such construction, he proceeded accordingly to erect said balcony. The bill then shows the licensing and acquiescence in, by the city, of kindred uses and occupations of its streets; the granting of permits by said park board to proprietors and owners of other hotel property on said avenue to erect piazzas, balconies, bay-windows, verandas, etc., and alleges that if complainant be prevented from making and having his balcony it will be an unjust discrimination, etc.; that said commissioners have no power to interfere with structures along said avenue unless the highway is obstructed or a nuisance committed *on the surface*; that after said balcony had been erected, as aforesaid, the said park commissioners forcibly tore down and removed it, and that said commissioners threaten to prevent him from restoring the same; prays for injunction restraining said park commissioners from interfering with the rebuilding of said balcony.

Answer was filed by the park commissioners, which admits their possession and control of Michigan avenue between the



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Statement of the case.

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points named in the bill, etc.; denies that the city ordinances in regard to projections over street line have any application to said portion of Michigan avenue; avers that when the entrance to complainant's building was originally built, the said avenue was not under the control of said park commissioners; that said complainant, by his agent, applied to the president of the board for a permit to erect a balcony over the building line; that he was answered that the board would not grant any such permit,—that he should make his application in writing, and present it at the next regular meeting of the board, and that no such application was ever made; denies, among other things, that the city of Chicago has granted permission, since the possession and control of Michigan avenue was turned over to said park commissioners, for the construction of any projections or obstructions along the line thereof; that on December 16, 1890, said commissioners were informed, in writing, by the commissioner of buildings of the city, that all buildings on Michigan avenue, between Jackson and Fifty-fifth streets, must be strictly confined to the lot line, and that since then no projecting constructions have been permitted; avers that complainant's balcony is an encroachment upon the highway, and contrary to law, etc., and admits its removal by the direction of the park commissioners, etc.

Hearing was had on bill, answer, replication thereto, and proof, and an order entered, May 4, 1892, denying injunction. On October 17, on motion, leave was granted to file a supplemental bill, which was accordingly done on the following day, stating that subsequent to the filing of the original bill, complainant filed with the commissioner of public works of the city of Chicago, plans and specifications for the erection of a balcony over said Michigan avenue entrance to said hotel building, and applied for a permit to build the same; that afterwards, on September 26, on report of the committee having the matter under consideration, the city council made

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Opinion of the Court.

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and adopted an order granting a permit to complainant, which was duly approved by the mayor, etc.; alleges that in pursuance of said order a permit was granted complainant to erect said balcony according to said plans and specifications; alleges that the legislature had invested the city authorities with power to prescribe the manner of construction of all kinds of buildings within said city, and that said authorities had power to grant said permit; that, notwithstanding said permit, said park commissioners still refuse to allow complainant to build said balcony, threaten to prevent by force the erection thereof, and to tear it down if erected; prays injunction as in the original bill, etc.

Answer was filed, alleging said permit of the city council to be null and void, and admitting that said park commissioners will not allow the erection of said balcony, and will prevent the same, etc.; denies the equities of the bill, etc.

Hearing was had February 16, 1893, on the original bill and answer thereto, and replication, the supplemental bill, answer thereto, and replication, the stipulation of the parties, and proofs, and a decree entered dismissing both the original and supplemental bills for want of equity. The complainant prosecutes an appeal to this court.

**Messrs. PENCE & CARPENTER**, for the appellant.

**Mr. A. W. GREEN**, for the appellee.

**Mr. JUSTICE SHOFF** delivered the opinion of the Court:

This is an appeal from the decree of the circuit court of Cook county, dismissing, for want of equity, appellant's bill, brought to restrain appellees from interfering with the construction of a balcony in front of appellant's hotel building on Michigan avenue, in the city of Chicago. The balcony which appellant proposed erecting would project out from the front of his building some six feet beyond the lot line, at a height

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Opinion of the Court.

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of sixteen feet above the sidewalk, and was to be about thirty-three feet long, and supported by pillars of the archway or entrance, placed fifteen years before, by consent of the city authorities, upon the edge of the street, about two and one-half feet beyond the lot line. Thus, it will be seen, the balcony, when built, would extend and overhang the street three and one-half feet beyond the pillars of the entrance. Appellees persisting in their refusal to consent to or permit the building of the balcony, appellant applied to the city council of the city of Chicago for a license therefor, which was subsequently granted, and issued by the commissioner of public works, purporting to authorize appellant "to erect and maintain a balcony over the entrance of the building at the northwest corner of Van Buren street and Michigan avenue, the same being known as the 'Victoria Hotel,' in accordance with plans on file in the office of the commissioner of public works," which permit, and authority thereunder to construct said balcony, threats of appellees to interfere with and prevent the construction thereof, are set out and alleged in the bill. The answer of appellees to appellant's bill denied that the city council of the city of Chicago had any power or authority to grant said permit, and alleged that the same was null and void, and legally insufficient to authorize the construction of said balcony, etc.; that said South Park Commissioners have refused, and still refuse, to allow such work to proceed, and will prevent the same, and that they refuse to recognize any power in the city of Chicago to issue such permit, etc., upon which issue was joined in due form.

The question presented upon this record is, whether the construction of the balcony in question was a matter over which the South Park Commissioners had jurisdiction and control. If they had, it can not, we think, be seriously questioned that they were authorized to forbid and prevent the erection thereof, and that the city had no authority in the premises, so far as pertained to Michigan avenue between the south

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Opinion of the Court.

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lines of Jackson and Thirty-fifth streets, for it could scarcely be contended, in the absence of the contrary appearing, that the legislature intended to make the powers of the park commissioners and of the city authorities, in respect of subjects matter within the control of either, cotemporaneous and co-equal, and thus create dual governments. In case of conflict, as here, the right of control belongs to the one or the other,—not to both. Concurrent powers, where they exist, must be of such nature that they can be possessed and exercised without conflict, or the possession and exercise by the one must exclude the like possession and exercise by the other. It is not pretended that the powers of the park commissioners and of the city authorities of the city of Chicago are concurrent. On the contrary, the contention is sharp, that, on the one hand, it is a matter exclusively within the control of the city authorities, and, on the other, that of the park commissioners.

The act of 1869, (Private Laws, vol. 1, p. 358,) creating the Board of South Park Commissioners, among other things provides, (sec. 2,) that "said board of commissioners shall be a body politic and corporate, and shall have and enjoy all the powers necessary for the purposes of this act." Section 4 provides for the selection, by the commissioners, of certain lands therein described, etc., "which said land and premises, when acquired as provided by this act, shall be held, managed and controlled by them and their successors as a public park, for the recreation, health and benefit of the public, and free to all persons forever," etc. By section 13 it is provided: "The said board shall have the full and exclusive power to govern, manage and direct said park; to lay out and regulate the same; to pass ordinances for the regulation and government thereof; to appoint such engineers, surveyors, clerks and other officers, including police force, as may be necessary; to define and prescribe their respective duties and authority, fix the amount of their compensation, and, generally, in regard to said park, they shall possess all the power and authority

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Opinion of the Court.

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v conferred upon or possessed by the common  
ne city of Chicago in respect to the public squares  
in said city," etc.

action last quoted, the South Park Commissioners,

to the powers therein specifically enumerated,  
ss, generally, in regard to the park, "all the power  
ity now by law conferred upon or possessed by the  
uncil of the city of Chicago in respect to the public  
l places in said city." Consideration at length of  
of the city council in the respect mentioned, under  
isting acts, (charter of 1865, and amendments,) is  
l important. While, in some particulars, differ-  
o be found, in the extent or manner of exercise of  
ffered upon the council, between the provisions of  
and the general law of 1872, for the incorporation  
nd villages, now in force in Chicago, they are not  
or, in either case, in so far as such charter provi-  
t have any bearing upon the question, the powers of  
n council were plenary and complete,—that is to  
under the charter the common council, in respect of  
ares and places, had authority and power as ample  
sted in them by the act of 1872; or, in other words,  
se in such public squares and places being vested in  
a trust for the use of the general public, the com-  
cil of the city could improve and control them, and  
needful rules and regulations for their management  
*Alton v. Transportation Co.* 12 Ill. 38; *Chicago v.*  
51 id. 266; *Jacksonville v. Jacksonville Railway Co.*  
) ; *Carter v. Chicago*, 57 id. 285.

plain language of the act, it seems clearly to have  
purpose of the legislature to invest the South Park  
oners with powers, generally, at least, as full and  
in regard to the park, as that conferred upon or  
by the city council of Chicago in respect to public  
nd places in said city, each holding by the same

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Opinion of the Court.

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kind of tenure, and in relation to the respective subjects matter referred to, the one clothed with powers identical in extent with those vested in the other.

In *The People ex rel. v. Salomon*, 51 Ill. 37, this court, in passing upon the act of 1869, above quoted from, after holding, as has been done in numerous cases since, under this and other park acts, (*West Chicago Park Comrs. v. McMullen* 134 Ill. 170,) that the park commissioners, under the act, became a municipal corporation, vested with power of government, and an agency of the State, for governmental purposes, in respect of the park, the object of their creation being municipal in character, said: "It is argued that this park property belongs to these commissioners as a corporation. This is so by the terms of the act. They hold the fee, but the *usufruct* is in the public." This language was used in deciding the particular point, there raised by counsel, as to whether the park property was subject to taxation, and it was held that it was not, for the reason that, the fee being vested in the park commissioners as a municipal corporation, in trust for the public, such property was not taxable. In view, therefore, of the plain provisions of the act of 1869, and the construction thus placed upon it by this court, there could, it would seem, be no mistake or misconception as to the powers of the park commissioners in relation to the parks acquired under the act.

Prior to the year 1879 no authority was vested in park commissioners of the State enabling them to acquire public streets leading to the parks under their control, (*Kreigh v. Chicago*, 86 Ill. 407,) and in the case just cited it was held that the city, holding the streets in trust for the public, had no authority to alien or divest itself of control over them; that authority to surrender a street by the city to the park commissioners was not to be presumed to have been granted by the legislature, and should be made to appear by the clear letter of the law, and such power was there held not to exist, clearly indicating that, with appropriate legislative enactment

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Opinion of the Court.

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to that end, a transfer of a street from the city to the park commissioners might be legally made. In that year, however, the needed legislation was supplied. By the act entitled "An act to enable park commissioners or corporate authorities to take, regulate, control and improve public streets leading to public parks," etc., approved and in force April 9, 1879, it was provided (sec. 1): "That every board of park commissioners shall have power to connect any public park, boulevard or driveway under its control, with any part of any incorporated city, town or village, by selecting and taking any connecting street or streets, or parts thereof, leading to such park," and providing that such street or streets lie within territory composed of property taxable for maintenance of the park, and that consent, in writing, thereto, of the owners of a majority of the frontage of lands and lots abutting on such street, be first obtained, etc. This and section 2, with slight amendment and modification not important here, were re-enacted in 1885. (Laws of 1885, p. 225.) By section 3 it is provided: "Such park boards shall have the same power and control over the parts of streets taken under this act as are or may be by law vested in them of and concerning the parks, boulevards and driveways under their control." Section 4 provides for reverter of such streets to the proper city or village authorities in case the same shall pass from the control of the park board, etc. And section 5, that "any city, town or village in this State shall have full power and authority to invest any of such park boards with the right to control, improve and maintain any of the streets of such city, town or village, for the purpose of carrying out the provisions of this act."

By this act, power is conferred upon the park commissioners to take and accept public streets of the city and assume control thereof, and upon the city authorities, power to consent thereto and surrender the same. Regardless of where the fee in the street might, in such case, be found ultimately

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Opinion of the Court.

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to be lodged, the power of the legislature, where private right will not be violated, to change the possession and control of the trust, can not be questioned. (*The People ex rel. v. Walsh*, 96 Ill. 232; *West Chicago Park Comrs. v. McMullen*, *supra*.)

And, as said in the latter case, when the new municipality is established under the act, it becomes a creature of legislative control, and, with the exception of the saving of private right, the legislature may, in respect of such agency, as with other municipalities, repeal the law of its creation, abridge its powers or enlarge them, within the prescribed territory, at will.

The park commissioners having, therefore, been clothed with power and authority to take and receive public streets, and assume control thereof, leading from the park, the extent of their powers over the same, when a street has come into their possession and control, under the acts, is next to be considered.

In respect of the parks proper, we have seen that, in addition to the other powers specifically mentioned in the act of 1869, their power and dominion, generally, are as ample and complete as those vested in the common council over the public squares and places of the city. If, therefore, such is the power of the commissioners in relation to the park, including, necessarily, the streets, boulevards and driveways therein, (sec. 10, act of 1869,) what power is vested in them over streets acquired under the act of 1879? The answer is obvious, and comes from the act itself: that they are to have the same power and control, in respect to streets taken under the act, as are or may be "vested in them of and concerning the parks, boulevards or driveways under their control,"—that is to say, that having, under the act of 1869, power and dominion, generally, over the park, boulevards and driveways under their control, identical in extent with that vested in the common council over the public squares and places of the city, such park commissioners, in respect of streets acquired by them under the act of 1879, are to exercise the same power



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Opinion of the Court.

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and dominion. It could scarcely for a moment be doubted, that, as to encroachments upon the park, and obstructions or purprestures in the streets, boulevards or driveways thereof, the park commissioners are invested with power, ample and complete, to prevent and remove the same; and if this be so, as we think it must, they are vested with no less power in respect of encroachments upon, purprestures and obstructions in the streets and driveways acquired under the act of 1879. On the contrary, their powers in this regard are the same. And this, we think, is in perfect accord with the legislative intention, if the plain import of the language employed is to obtain. If, as provided in said act of 1869, they have "power to govern, manage and direct" in respect of the park, we conceive no satisfactory reason for holding that the legislature did not intend vesting them with the same power in reference to streets leading thereto, acquired under the later act. Nor do we think any sufficient reason exists why said commissioners in respect of such streets, may not, in so far as they are applicable, exercise any of the powers conferred by said act, or which "may be by law vested in them of and concerning parks, boulevards or driveways under their control."

By ordinance adopted by the city council of Chicago, June 23, 1879, consent was given and granted to said South Park Commissioners "to take, regulate, control and improve" Michigan avenue from the south line of Jackson street to the south line of Thirty-fifth street, the city reserving its rights in relation to the laying of water and gas mains and pipes, and the building and repairing of sewers, tunnels and drains in said street, etc. No question is raised as to compliance with the provisions of the act, but it is insisted by appellant that whatever the authority of the park commissioners over said portion of Michigan avenue, they have no right to interfere with buildings along the line of said avenue which do not interfere with public travel over the surface thereof. Undoubtedly the au-

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Opinion of the Court.

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thority of the park commissioners ceases at the line on either side of the street, and as to the character, height or dimensions of buildings, or of what material they shall be constructed, along the line of the street, they have no control. But so far as the street proper is concerned, they have the same powers as are vested in them of and concerning the park, boulevards and driveways under their control, subject only to the reservation made by the city in the ordinance above referred to. It is, in effect, conceded that the balcony in question, if erected, will be an encroachment over and beyond the line of said part of Michigan avenue. This being so, and the park commissioners having acquired, under said act of 1879, the control of said street, there can, it would seem, be no question as to their power and authority in the premises, and the consequent exclusion of the authority of the city over the same.

It is contended, in argument, that the custom had so far prevailed in the city, of erecting porches, porticos, awnings, cellar-ways, etc., beyond the lot line, that the park commissioners are estopped from preventing the erection, in the absence of an ordinance prohibiting the same, of the balcony in question. It will be unnecessary to determine, here, whether the use of the way above the street in the manner here proposed, would or would not be a reasonable use of the same, in the absence of legislative declaration or municipal license. There is no allegation in this bill of any public usage or custom for the erection and maintenance of encroachments of like character upon the public streets, independently of license or permit from the municipal authorities of the city. The allegation is, and the proof offered by complainant tends to show, that for many years it has been the custom of the city of Chicago to grant permits to build porticos, piazzas, etc., over main entrances to buildings, extending beyond the lot line, and, in like manner, to grant permission for basement entrances upon the sidewalk, etc. But the evidence shows that the lot owner who designed building, or making additions to,

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Opinion of the Court.

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g, the walls outside of his building, was required by  
ices of the city to submit to the proper officer his  
pecifications of the proposed work. Upon approval  
ermit or license was granted, thus, in each case,  
aining control over and direction of the erection of  
hments upon or over the streets.

edly, the owners of lots bordering upon streets or  
the right to make all proper and reasonable use of  
of the street for the convenience of their lots, not  
it with the paramount right of the public to the use  
et in all its parts. (*Smith v. McDowell*, 148 Ill. 51,  
cited.) In the absence of legislative direction or  
declaration of what such rights shall be, what is to  
a reasonable and proper use will depend, in a large  
on the public usage in like instances, and upon the  
tion. General use by lot owners, and acquiescence  
the public and public authorities, may always be  
as evidence of what is a reasonable and proper use  
existence of the right. (2 *Dillon on Mun. Corp.*  
585, 794; *O'Linda v. Lathrop*, 21 Pick. 292; *Com.*  
7, 107 Mass. 234; *Nelson v. Godfrey*, 12 Ill. 22.)  
pparent, we think, that question does not arise here,  
ason that the city authorities had at all times, so  
wn, by municipal legislation, assumed and retained  
l and direction of all structures intruding upon or  
treets. If, therefore, it be conceded that the course  
pursued by the city authorities is binding upon  
ommissioners, a permit from the latter would be  
o authorize the construction of the balcony in ques-  
at complainant so understood, is evinced by the  
having made application for such permit, first, to  
commissioners, and upon their refusal to grant it,  
e city authorities. It will therefore be unnecessary  
whether the proposed balcony was such an obstruc-  
croachment upon the avenue as would be a nuisance  
50 ILL.

## Syllabus.

*per se*, or such as the municipal authorities, holding the streets in trust for the use of the general public, could not authorize, (*Smith v. McDowell, supra*; *Field et al. v. Barling et al.* 149 Ill. 556,) or was such as might be licensed, as being a use of the street not inconsistent with the public right and use.

The complainant having shown no license or right to erect and maintain the balcony proposed to be erected, we are of opinion, irrespective of whether the fee of the avenue was, by operation of law, vested in the park commissioners or not, that an injunction restraining them in the premises was properly denied.

The decree of the circuit court dismissing the bill will be affirmed.

*Decree affirmed.*

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SPENCER S. HOLT *et al.*

v.

THE CITY OF EAST ST. LOUIS.

*Filed at Mt. Vernon June 19, 1894.*

1. SPECIAL TAXATION—*what is abutting property.* It is no valid objection to a special tax to pay for grading or paving a street, that the city or village is not required to pay the cost of improving the street intersections. Streets crossing the one sought to be improved are not abutting lots.

2. The object of special taxation is not to have each lot pay for the actual cost of what is done in front of it, but to have it pay its proportionate share of the whole cost of the improvement.

APPEAL from the County Court of St. Clair county; the Hon. BENJAMIN BONEAU, Judge, presiding.

Mr. W. C. KUEFFNER, for the appellants.

Messrs. CONKLING & GROUT, and Mr. F. G. COCKRELL, for the appellee.

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Opinion of the Court.

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PER CURIAM: This is an appeal from a judgment of confirmation of a special tax to pay the cost of grading and paving Baugh avenue, in East St. Louis. The ordinance provides that the cost shall be paid by special taxation of contiguous property, in proportion to its frontage. Appellants' only objection to the tax assessed under the ordinance is, that the city is not required to pay the cost of street intersections, and they contend that streets crossing the one on which the improvement is made are abutting property, within the meaning of the statute. We do not agree with this contention. The question raised is disposed of in *Walters v. Town of Lake*, 129 Ill. 23, in which we used the following language: "But it was still further urged as an objection to the assessment roll, that the intersections with Winter street of the side streets which crossed it should have been assessed as being property belonging to the town and benefited by the improvement. It has been held that property owned by the municipality, such as a public square in a city, may be assessed for the improvement of a street on the side of it. (*Scammon v. City of Chicago*, 42 Ill. 192; *Taylor v. The People*, 66 id. 322; *County of McLean v. City of Bloomington*, 106 id. 209). But in such case the property benefited, although being alongside of the street improved, is yet outside of such street and apart from it. Here, however, the portions of Winter street where the side streets cross it are part of the street itself upon which the improvement is made." See, also, *Lightner v. City of Peoria*, ante, 80.

The object of special taxation is not to have each lot pay for the actual cost of what is done in front of it, but its proportionate share of the whole. The cross-street intersections, not being abutting or fronting property, can not be taxed, and appellants' property only bears its proportionate part of the whole cost.

The judgment of the county court will be affirmed.

*Judgment affirmed.*

## THE NORTH CHICAGO STREET RAILROAD COMPANY

v.

THOMAS W. WRIXON, Admr.

*Filed at Ottawa June 19, 1894.*

1. **APPEAL**—*waiver of error.* Where a party fails to make the refusal of instructions a ground for a new trial, and in his abstract in the Appellate Court fails to give the instructions asked and refused, and states in his brief filed in that court that he makes no point on the refusal of instructions, he will thereby waive his right, on appeal to this court, to assign for error the refusal of his instructions.

2. A party can not take the judgment of the Appellate Court upon a question of fact, merely, and waive questions of law arising upon instructions, and when defeated on the fact, insist in the Supreme Court upon an error of law which was withdrawn from the consideration of the Appellate Court.

3. **SAME**—*remittitur in the Appellate Court.* A plaintiff in an action sounding in damages, on appeal to the Appellate Court, and after an order of reversal, on his motion had the judgment of reversal set aside, and entered a *remittitur* of one-half of the amount of the verdict, whereupon the Appellate Court entered judgment for the balance of the amount: *Held*, that the Appellate Court was authorized to allow the *remittitur*, and that in so doing and entering judgment for the remainder there was no error.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

Mr. EGBERT JAMIESON, and Mr. EDMUND FURTHMAN, for the appellant.

Mr. ARNOLD HEAP, and MESSRS. ROSENTHAL & HIRSCHL, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was an action by appellee, administrator of the estate of William P. Wrixon, deceased, against appellant, to recover, for the use of next of kin, damages for personal injuries to

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Opinion of the Court.

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said William P. Wrixon, alleged to have been caused by the negligence of appellant, and which resulted in his death. A trial by jury in the circuit court resulted in a verdict for \$5000. Motion for new trial was overruled and judgment rendered for that amount. On appeal to the Appellate Court a *remittitur* of \$2500 was entered by the plaintiff, and the judgment affirmed for the residue of \$2500. The railway company brings the case to this court, and urges two grounds for reversal of the judgment of the Appellate Court: "First, 'the trial court erred in refusing each and every of the instructions by it refused, asked by defendant;' second, 'the Appellate Court erred in entering the *remittitur* and affirming the judgment of the trial court.'"

The instructions which it is urged the court erred in refusing, are numbered by counsel in their brief as 1, 2 and 3. We are not called upon to determine whether error intervened in the refusal of these instructions or not, but it may be said that the fact of negligence on the part of the defendant, and whether the plaintiff's intestate exercised such reasonable care and caution for his own safety as are usually exercised by children of the same age and degree of intelligence, was submitted to the jury by proper instructions. (*City of Chicago v. Keefe*, 114 Ill. 222; *Chicago City Railway Co. v. Wilcox*, 138 id. 370.) These questions of fact are settled adversely to appellant by the judgment of the Appellate Court, and are not here open to review.

A sufficient answer to the alleged error, that the court erred in refusing the instructions numbered 1, 2 and 3, is, that appellant has waived its right to insist upon that error, if error it was. In the abstract filed in the Appellate Court, and which has been filed by appellee in this court, the refused instructions were not abstracted, and thereby brought to the attention of that court. In the brief of appellant filed in that court the points urged for reversal are: "First, the verdict in this case is contrary to law; second, the verdict in this case

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Opinion of the Court.

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is contrary to the evidence; third, the verdict in this case was excessive." Each of these points, and none other, was urged as properly raised, upon the motion for new trial, in the trial court, and it is expressly stated by counsel in their brief that "no point is raised on the giving or refusal of instructions." Our attention, and that of counsel for appellant, is directly called to these facts, and that the brief and abstract of appellant in the Appellate Court have been here filed, by the brief of appellee, and no question is made as to the accuracy of these statements, nor is it pretended that any other abstract or brief was filed by appellant in the Appellate Court. Nor does it appear that the question arising upon these instructions was considered by that court. We are justified, therefore, in assuming it to be admitted that in the Appellate Court appellant abandoned any assignments of error upon refusal of the court to give instructions asked by it. That being so, appellant is in no condition to insist upon the error here. A party can not take the judgment of that court upon a question of fact, merely, and waive questions of law arising upon instructions, and, when beaten upon the fact, insist in this court upon error of law which was withdrawn from the consideration of that court. To permit such practice would be unfair to the Appellate Court, would entail unnecessary expense upon the parties litigant, and encumber the dockets of the courts with unnecessary litigation.

The only question raised by counsel, properly before us, is, whether the Appellate Court erred in entering a *remittitur* at the instance of the plaintiff below. Upon consideration of the case, that court entered judgment January 11, 1894, reversing and remanding the cause. On January 15, 1894, being one of the days of the same term of that court, appellee moved that the order of reversal and remandment theretofore entered be set aside, and at the same time filed a *remittitur* of \$2500 of the judgment. Thereupon the court set aside and vacated its former order and judgment, and entered a judg-



Opinion of the Court.

ing that of the court below for the sum of \$2500, and judgment for said amount in favor of appellee against appellant, and for costs, etc.

sted, that in actions where the recovery is of undamages, a *remittitur* may not be entered, and the error in the verdict and judgment, because it is excessively cured. The difficulty of settlement of this question of principle is fully recognized, but we are committed to the practice of allowing *remittitures* in actions *ex delicto*, by the trial and Appellate Courts, to such sum as shall seem not excessive, and affirming as to the balance of the judgment. By section 81 of the Practice act the entry of a *remittitur* in the appellate courts is authorized. It may not be here collate some of the leading cases in the State upon this question.

*v. Fischer*, 71 Ill. 576, was an action on the case. The jury returned a verdict for \$1600, and, on a new trial, plaintiff remitted one-half, and judgment entered on the verdict for the balance,—\$800. It insisted that by the *remittitur* plaintiff conceded the error to be unjust, etc., and that the defect was not cured but that the error could be corrected only by submitting the cause to another jury,—citing, in support of this, *Wormack v. Wormack*, 13 Texas, 580, *Nudd v. Wells*, 11 Texas, 11, and *Clafin v. Delaney*, 38 N. Y. 138, and as sustaining the contention, in so far as “that, in awarding wholly in damages, and where the damages are awarded, the court can not order a *remittitur* as the alternative to a new trial.” But it was there said: “That a party may remit in such cases is a practice so interwoven in our jurisprudence, we are unwilling to disturb it. The practice of our courts, where a jury has passed upon a question of undamages, though the court below may have the right to direct the plaintiff to remit, or a new trial, and, yet if the plaintiff himself, on a motion for a

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Opinion of the Court.

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new trial being made, voluntarily remits part of the damages, the verdict must stand for the balance,—and this, for the reason that it is necessary an end should be put to litigation, and actions for vindictive damages not be encouraged.”

*Illinois Central Railroad Co. v. Ebert*, 74 Ill. 399, was an action to recover damages for injuries sustained by plaintiff in a collision on defendant's road. Verdict was returned for \$10,000, and, on motion for new trial, plaintiff, by his attorney, remitted \$6000 of the finding, and the court entered judgment for the balance,—\$4000; and the learned Justice BREESE, who delivered the opinion of the court in the preceding case, while criticising the rule which has obtained in such cases, again declared the practice to be too firmly established to be displaced, and the judgment was affirmed.

*Lœwenthal v. Streng*, 90 Ill. 74, was an action on the case for malicious prosecution, and a verdict was returned for plaintiff for \$10,000. Motion for new trial was made and overruled, whereupon the plaintiff entered *remittitur* of \$4000, and judgment was rendered for \$6000. The court, by Justice WALKER, regarding the verdict as “outrageously excessive,” said: “It could only have been induced by prejudice, passion or total misconception of the case; and when it is so flagrantly excessive as to be only accounted for on the ground of prejudice, passion or misconception, the *remittitur* does not remove the prejudice, passion or misconception.” The court, however, does not there reverse the judgment on this ground, but on the ground that they still regard it, notwithstanding the *remittitur* of \$4000, “as grossly excessive.”

*Albin v. Kinney*, 96 Ill. 214, was an action on the case against a physician for alleged malpractice in his treatment of the plaintiff. By leave of the court, plaintiff entered a *remittitur* of part of the verdict and judgment was rendered for the residue, and it was there said: “The practice of permitting a *remittitur* of a portion of the verdict found, even in actions sounding in damages, is so well settled that the point

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Opinion of the Court.

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made against the judgment in this case, on account of the *remittitur* entered, need not be discussed as a new question. The rule is uniform, that when there is a motion for a new trial on the ground of excessive damages, plaintiff may, if he chooses, remit a portion of the verdict to obviate the objection. The court can not compel a plaintiff to remit any portion of his verdict, but he may have his election to do so, or stand the chances of another verdict."

*Union Rolling Mill Co. v. Gillen*, 100 Ill. 52, was an action for injuries sustained by the plaintiff by reason of the negligence of the defendant. The jury found a verdict for plaintiff for \$5000. A *remittitur* having been entered by plaintiff of \$2000, the court rendered judgment upon the verdict for \$3000. It was contended in this court that entry of judgment upon the verdict was erroneous,—that while the practice might be proper to allow *remittitur* in actions *ex contractu*, it was otherwise in actions *ex delicto*, and that in such latter cases, if the jury was unfair in assessing the damages, it should be taken for granted that the jury was also unfair in deciding upon the issue. The court there held the practice to be established of allowing *remittitur* in actions *ex delicto* as well as *ex contractu*,—citing cases *supra*.

In *Libby et al. v. Scherman*, 146 Ill. 554, which was an action for personal injury caused by the negligence of the defendant, the court held the rule to be so firmly settled in its application to such cases as to be beyond question.

The practice of allowing entry of *remittitur* in the Appellate Court was expressly sanctioned in *Chicago, Burlington and Quincy Railroad Co. v. Dickson*, 88 Ill. 431. That was an action to recover damages for personal injury inflicted by the negligence of the defendant railroad company. A judgment had been rendered for \$6500, which was complained of as excessive. After appeal to this court a *remittitur* of \$2500 was entered, and the judgment for the amount of \$4000, being the amount of the judgment less *remittitur*, was affirmed.

## Syllabus.

Without continuing the citation of cases, enough have been given to show the practice in this State; and while in some of them the rule has been strongly criticized, it has been adhered to, and has become the uniform practice in all the courts of the State, and ought not now to be changed.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

H. C. MITCHELL *et al.*

v.

FLORA HINDMAN.

*Filed at Mt. Vernon June 19, 1894.*

1. **EVIDENCE**—*sustaining an objection to a question—afterwards answered.* There is no error in sustaining an objection to a question, where the fact sought to be proved by it is afterwards shown by answer to another question to which no objection is made.

2. **SAME**—*degree of proof required.* An instruction in a civil action that the plaintiff was "bound to prove to the satisfaction of the jury, by a clear preponderance," is clearly erroneous, and properly refused. The law only requires that a preponderance of evidence shall be in favor of the plaintiff.

3. **INSTRUCTIONS**—*as to the burden of proof.* It is not necessary that the instructions for the plaintiff shall state where the burden of proof rests. It is sufficient if, from all the instructions given to the jury as the charge of the judge, it clearly appears, and is so stated to the jury, upon whom the burden rests. If one of the instructions for the defendant positively states on whom it rests, that will be sufficient.

4. **SAME**—*as to preponderance of the evidence.* An instruction that the preponderance of the evidence is not alone determined from the number of the witnesses testifying, but the jury should take into consideration the opportunities of the witnesses for seeing or ascertaining, from their own personal knowledge, the things about which they testify, and the probability or improbability of the truth of their statements, in view of all the other evidence, facts and circumstances proven, and from the circumstances determine the preponderance, etc., does not exclude from the jury the consideration of expert evidence.

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164 336  
150 538  
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Opinion of the Court.

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5. **MALPRACTICE**—*facts to be considered.* In an action for malpractice in the treatment of a broken bone in the plaintiff's wrist, the condition of the arm at the time of the injury, the manner of treatment by the defendants, the length of time the bandages and splints were permitted to remain, and whether complaint was made by the plaintiff of severe pain in the hand whilst such bandages were so kept on, are all facts, and in determining them the jury should take into consideration the opportunities of the several witnesses for ascertaining from their own personal knowledge, and whether there was proper diligence and care in the treatment was not to be determined from that alone, but those facts must be weighed in connection with all the evidence, facts and circumstances,—that is to say, the expert evidence,—and the jury should determine, from all the evidence and circumstances, whether the defendants were negligent.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Jackson county; the Hon. OLIVER A. HARKER, Judge, presiding.

Mr. F. M. YOUNGBLOOD, and Mr. NORMAN H. MOSS, for the appellant.

Mr. WILLIAM A. SCHWARTZ, for the appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the Court:

Appellants, physicians and surgeons, were partners, engaged in practice, and were called to attend, professionally, the appellee, who had sustained an injury to the left forearm, designated a Colles' fracture of the radius, about one and one-half inches above the wrist joint. Appellee brought an action against appellants, alleging they so unskillfully and negligently performed their duty that the arm so injured was permanently disabled, and a judgment for \$1250 was entered in her favor, which was affirmed by the Appellate Court. This appeal is prosecuted, and the errors of law assigned are, that there was error in sustaining an objection to the admission of certain evidence offered by appellants, in refusing to give the sixth instruction asked by appellants, and in giving instructions asked in behalf of appellee.

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Opinion of the Court.

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The error assigned to the ruling of the court in sustaining an objection to a question to Dr. McAnally, one of the defendants, is not tenable. The witness was asked if he had used his best skill and judgment in the treatment of the injury. An objection was sustained to the question, because in the form asked it was leading; yet later, during the examination of the same witness, he was asked a question in substantially the same form, which was not objected to, and was answered by the witness, and the identical same fact asked for in the question to which the objection was sustained, was by the later question brought before the jury.

The sixth instruction asked by the appellants was refused. It was, that the plaintiff was "bound to prove to the satisfaction of the jury, by a clear preponderance," etc. This instruction was clearly erroneous. The law only requires that a preponderance of the evidence shall be in favor of the plaintiff. *Crabtree v. Reed*, 50 Ill. 207; *McDeed v. McDeed*, 67 id. 545; *Peak v. The People*, 76 id. 289; *Bitter v. Saathoff*, 98 id. 266.

It is urged that the series of instructions given for the plaintiff fails to state to the jury that the plaintiff must prove the defendants caused the injury by reason of want of ordinary skill, or from failure to exercise proper diligence and caution, by a preponderance of the evidence. It is not necessary that such instructions should state where the burden of proof rests. It is sufficient if, from all the instructions given to the jury as the charge of the judge, it clearly appears, and is stated to the jury, upon whom the burden rests. In the third instruction given for defendant the jury were directly and positively instructed on whom the burden of proof rested, and this was sufficient.

The eighth instruction given for plaintiff, it is insisted, is erroneous. That instruction states that the preponderance of the evidence is not alone determined from the number of witnesses testifying, but the jury should take into consideration

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Opinion of the Court.

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the opportunity of the witnesses for seeing or ascertaining, from their own personal knowledge, the things about which they testify, the probability or improbability of the truth of their statements in view of all the other evidence, facts and circumstances proven, and from the circumstances determine the preponderance,—that it is for the jury to determine, from the evidence and circumstances before them, whether the defendants were negligent. This instruction does not exclude from the consideration of the jury expert evidence, as claimed by the appellants. The condition of the arm at the time of the injury, the manner of treatment by the appellants, the length of time the bandages and splints were permitted to remain, and whether complaint was made by appellee of severe pain in the hand whilst said bandages were so on, are all facts, and in determining those facts the jury should take into consideration the opportunity of the several witnesses for ascertaining from their own personal knowledge; and whether there was proper diligence or care in the treatment was not to be determined from that alone, but those facts must be weighed in connection with all the evidence, facts and circumstances,—i. e., the expert evidence,—and the jury should determine from the evidence and circumstances whether the defendants were negligent. We are of opinion that the eighth instruction did not mislead the jury in any manner.

From a consideration of the whole record we find no reversible errors, and the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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185	475
150	542
190	429

NELSON MORRIS *et al.*

v. .

C. B. JONES, Collector.

*Filed at Mt. Vernon June 19, 1894.*

1. **ASSESSMENT FOR TAXATION**—*money in bank—deducting amount of debts.* A party having money in bank on the first day of May, is required, by Item 26 of section 25 of the Revenue act, to list the same for taxation, and he can not refuse to do so on the ground that he owes debts to an amount equal to such money. As to credits other than of bank, banker, broker or stock jobber he is allowed to deduct therefrom the amount of his *bona fide* indebtedness.

2. There is nothing in the statute allowing deductions of indebtedness against tangible property owned by a tax-payer, no matter what may be the character of such property. Money, like horses, cattle or other chattel property, is made taxable under our statute, without reference to the indebtedness of the owner. But as to credits, viz., moneys due, *bona fide* debts owing may be deducted.

3. **SAME—duty of assessor to assess property not listed.** If a tax-payer omits from his schedule of personal property, money in bank, it is not only the right, but the duty, of the assessor, on learning that fact, to place it on the schedule, and he is not required to give the tax-payer any notice whatever of his action in that regard.

4. **SAME—deductions from credits.** If a tax-payer deducts his indebtedness from his credits, it must be done in the manner provided by section 29 of the Revenue act. It is not for him to say the indebtedness equals or exceeds the credits, and therefore refuse to list the credits.

APPEAL from the Circuit Court of St. Clair county; the Hon. A. S. WILDERMAN, Judge, presiding.

Messrs. HAMILL & BORDERS, for the appellants.

Mr. M. W. SCHAEFER, State's Attorney, and Messrs. TURNER & HOLDER, for the appellee.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This was a bill in chancery to enjoin the collection of \$255 claimed to be due as taxes levied and due on a certain item of personal property in an assessment returned by Thomas



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Opinion of the Court.

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Vaughn, assessor for Stites township, in St. Clair county, for the year 1891. The item, as it appears on the assessment list, is for "moneys of other than bank, banker, broker or stock jobber, \$10,000." The money was assessed as being on deposit in bank.

The bill, in substance, avers, that on June 10, 1891, the assessor called at complainants' office or place of business in Stites township to receive a list of their personal property for assessment; that a schedule of all their personal property owned or controlled by them, subject to taxation, in that township, was made out and delivered to him, which he received without objection; that their agent was then and there ready and willing to make oath to such schedule, but the assessor waived the same; that afterwards, and without any notice whatever to complainants, he added to the list or schedule so furnished him, the item of \$10,000, and that they had no knowledge of that item being added thereto until after the meeting of the town board of review, and were therefore unable to present their objections thereto before that board. It further avers that they did make application to the county board of supervisors, at their meeting in July of that year, and made effort to have said board set aside the assessment upon said item, but that it refused to take any action thereon, for the reason that complainants had not appeared before and made their objections to the town board. It then avers that the \$10,000 was assessed against complainants wholly without authority of law, and fraudulently; "that on the first day of May, 1891, they did not have, nor were they possessed of, the \$10,000 so fraudulently placed upon the schedule, over and above their just and lawful indebtedness." The bill also avers that Philip Rhein is county clerk, and Arthur Herr is county collector of said county, and C. B. Jones is township collector for said Stites township, etc. The prayer of the bill is, that C. B. Jones be restrained and enjoined from collecting the tax so fraudulently assessed; that the said Philip

## Opinion of the Court.

Rhein be enjoined from extending the said tax, and the said Arthur Herr be enjoined from charging the tax extended on said assessment, against any real estate of said complainants, and from making application to the county court of said county for judgment on said tax. C. B. Jones, collector, alone answered, denying all the material allegations of the bill. Upon the hearing the bill was dismissed at the cost of complainants, and they prosecute this appeal.

The theory of the bill is, not that the complainants did not have \$10,000 in bank on the first day of May, 1891, but that they did not have that amount "*over and above their just and lawful indebtedness.*" While the testimony of the two witnesses in support of the bill is to the effect that they had no money in bank at all, it is fairly inferable that what they intended to say was, that they had none over and above their indebtedness, and one of them, in answer to a question by the court, so stated. It does not, therefore, seek to enjoin the collection of a tax on property not owned by the complainants, but to avoid the payment of taxes on money in bank, by deducting therefrom *bona fide* debts owing by them, equal to the amount of such money. There is no authority of law for any such deduction. Section 24 of the Revenue act (2 Starr & Curtis' Ann. Stat. chap. 120, p. 2035,) provides for making a schedule of personal property subject to taxation. Section 25 specifies what such schedule shall set forth, the twenty-sixth item being, "The amount of moneys other than of bank, banker, broker or stock jobber." Complainants having in bank \$10,000 in money, it was their duty to list it under that head. Failing to do so, it was not only the right, but the duty, of the assessor to place it on the schedule and assess it, and he was not required to give any notice whatever of his action in that regard. (*Wabash, St. Louis and Pacific Railway Co. v. Johnson*, 108 Ill. 11.) The twenty-seventh item on the schedule is, "The amount of credits other than of bank, banker, broker or stock jobber." Against that item deductions may be made

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Opinion of the Court.

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le indebtedness, (id. sec. 27,) in the manner protection 29. There is nothing in the statute allowing of indebtedness against tangible property owned by, no matter what may be the character of such Money, like horses, cattle or other chattel property, under our statute, without reference to the indebted owner. As to credits, viz., money due, *bona* owing may be deducted.

nothing in this case charging the assessor with misconduct to the prejudice of appellants. They had and failed to list it. He afterwards discovered it and listed it. On the showing of this bill they have no complaint of that assessment, in a court of equity or

If they had alleged and proved that they did not, or of fact, have the money, a different case would be presented. To say that they did not have it "over their indebtedness," amounted to nothing.

also of the opinion that if the item added to the had been credits, instead of money, this bill would even if appellants had the right to deduct indebtedness they must have done it in the manner provided by, *supra*. If they were entitled to any such deduction as the fault of their agent that they did not get the them. It was not for him to say the indebtedness exceeded the credits, and therefore refuse to list it. But it is unnecessary to pursue this view of the or what we have already said as to the attempt to deduct from money will dispose of this case.

ing is said in the argument as to this money being taxable; and not, therefore, subject to taxation in this under the evidence the point is, we think, without a sufficient answer to it is, that no such question is raised by the bill.

Decree of the circuit court will be affirmed.

*Decree affirmed.*

## Syllabus.

## THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY

v.

BRIDGET HESSIONS, Admx.

*Filed at Ottawa June 19, 1894.*5464 WH  
34 LEA

1. **NEGLIGENCE**—*limiting plaintiff's negligence to exact time of injury.* Where a party is injured by a moving train of cars while upon or attempting to cross railroad tracks, it is error to limit the requirement that he should be in the exercise of ordinary care, to the exact time of the injury. The question whether he exercised ordinary care in going upon the track is always necessarily implied.

2. **Slight negligence** is not necessarily incompatible with due and ordinary care, hence an instruction requiring the jury to believe, from the evidence, that the plaintiff's intestate was in the exercise of ordinary care for his own safety, and that injury resulted from the negligence of the defendant, is not erroneous.

3. **SAME**—*comparative.* The doctrine of comparative negligence, as announced in the earlier cases, is no longer the law of this State. The doctrine announced in the later decisions requires as a condition to a recovery by the plaintiff, that the person injured be found in the exercise of ordinary care for his own safety, and that the injury result from the negligence of the defendant.

4. **SURVIVORSHIP**—*action for causing death—when it arises—next of kin.* The statute giving a right of action for wrongfully causing the death of another, is exclusively for the benefit of the widow and next of kin of the deceased. The fact of survivorship of a widow or next of kin is an essential element of the cause of action, and it is therefore indispensable that it shall be alleged and proved.

5. **BILL OF EXCEPTIONS**—*incorporating in the transcript of the record.* The original bill of exceptions can not be used as a part of the transcript of the record, on appeal, without agreement of the parties.

6. **SAME**—*stipulation to use original bill of exceptions in the transcript.* The parties to a suit filed in the office of the clerk of the circuit court, in the cause, this stipulation: "It is hereby stipulated and agreed that the original bill of exceptions, instead of a copy, may be used in making up the record in the above entitled cause." *Held*, that the use of the original bill of exceptions was in making up the transcript of the record for the Appellate Court, and not the record of the trial court.

7. Where the parties file in the trial court a stipulation that the original bill of exceptions may be used in making up the record, and such bill is embodied in the transcript of the record, on appeal to the

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81a 147150 546  
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88a 40150 546  
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101a 8 10150 546  
199 128150 546  
105a 3 39150 546  
106a 138  
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## Syllabus.

urt, and the parties submit the case upon its merits, with-  
a to the original bill of exceptions, it was held, it was  
such bill of exceptions should be incorporated into the  
the record to be used on the appeal. But if it were  
the appellee, by failing to object to the transcript in the  
urt, and submitting the cause in that court on its merits,  
bjection that the original bill, instead of a copy, was used.

CTION—*whether authorizing recovery on counts not proved.*  
on that if the jury believed, from the evidence, that the  
testate, while exercising ordinary care, was killed by the  
of defendant, as charged in the declaration, they should  
plaintiff, is not erroneous on the ground that the evidence  
l to sustain one or more of the counts in the declaration.

as—*finding of the Appellate Court—whether shown by its*  
appeal from the Appellate Court this court can not con-  
inion of that court for the purpose of showing that the  
affirmance of the trial court was in reality the result of  
hat there was no bill of exceptions properly in the record.

Appellate Court affirms the judgment of the trial court  
he incompleteness of the record, without a consideration  
nation of the errors assigned, it should recite that fact in  
er, so as to present the question thus arising, to this court  
ppeal.

—*negligence of deceased a question of fact.* In an action by  
trator of a deceased person, against a railway company, for  
causing the death of the intestate, the negligence of the  
a question of fact, settled conclusively by the judgment of  
the Court in affirming the judgment of the trial court.

—*errors assignable—excessive damages.* On appeal from  
the Court it can not be assigned for error that the damages  
e.

DING—*statement of same cause of action in different counts.*  
for the pleader to state what is in reality the same cause of  
several counts of his declaration, the purpose being to meet  
phases of the evidence. When this is done, the counts are  
led as distinct from each other, and by apt reference, or  
must state a complete cause of action.

—*defects cured by pleading to the merits.* It is the well set-  
ne that many defects which might have been fatal on de-  
waived and cured by pleading to the merits. After plea  
laration will receive a reasonable interpretation.

—*action for negligently causing death—survival of next of*  
action on the case to recover damages for the death of the  
ntestate through negligence, the plender alleged, in each

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## Statement of the case.

of seven counts, the death and negligence, and at the end of the last count alleged the survival of a widow and next of kin, whose names were stated: *Held*, that in the absence of a demurrer the allegations in the plaintiff's intestate, at his death, left the persons named, his next of kin surviving, was applicable to all the counts of the declaration.

16. If the same allegation had been inserted in each count, or in one, with apt reference to that count in the others, they would have severally stated a good cause of action. It would probably have been better pleading to have alleged in the first count the survival of the widow and next of kin, as one of the essential elements constituting the cause of action, and either by repeating it, or by express reference in the subsequent counts, to have made the allegation thereof a part of each subsequent count.

17. *PRACTICE*—*directing what the verdict shall be.* An instruction directing the jury to find for the defendant can only be given when the evidence, with all the inferences legitimately arising therefrom, is insufficient to authorize a verdict for the plaintiff. If there is any evidence tending to sustain the issues in the plaintiff's behalf, the weight and degree of credit to be given to it must be submitted to the jury.

*APPEAL* from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

This was an action by appellee, administratrix of the estate of James Hessions, deceased, for damages to the pecuniary support of the widow and next of kin. On October 9, 1890, James Hessions was struck by the engine of a passenger train in the control of appellant's servants, where appellant's railway tracks cross Fifty-first street, in the city of Chicago, and was instantly killed.

The declaration contains seven counts. The negligence complained of in the various counts is, first, running at a greater rate of speed than permitted by the ordinances of the city; second and third, failure to ring the bell or sound the whistle; fourth, failure to lower the gates at the crossing upon the approach of the train; fifth, failure to place a flagman at the crossing, etc.; sixth, employment of incompetent employes; seventh, negligently, carelessly and improperly managing and driving its engine and cars at a high rate of

## Brief for the Appellant.

speed, failing to keep proper lookout for persons about to cross its tracks, failure to give such signals as would apprise such persons, exercising due care and caution, of the approach of the locomotive and train, and failing to stop the locomotive so as to prevent injury to the deceased.

The general issue was pleaded, a trial had by jury, resulting in a verdict for the plaintiff for \$5000, and judgment entered for the amount. On appeal to the Appellate Court this judgment was affirmed, and the defendant railway company appeals.

Messrs. GARDNER & McFADON, and Mr. PLINY B. SMITH, for the appellant:

Upon the admitted evidence the deceased was not in the exercise of due care, and consequently the verdict should have been for the defendant. *Railroad Co. v. Fitzsimmons*, 40 Ill. App. 361.

A person who attempts to cross a railroad track in advance of an approaching train, and miscalculates his ability to do so in safety, can not recover for a resulting injury. *Railroad Co. v. Fears*, 53 Ill. 115; *Bellefontaine v. Hunter*, 33 Ind. 335; *Railroad Co. v. Bell*, 70 Ill. 102; *Railroad Co. v. Houston*, 95 U. S. 697.

The first instruction for the plaintiff is bad, in allowing the jury to consider several counts of the declaration as to which there was clearly no evidence whatever. *Railroad Co. v. Benton*, 69 Ill. 174.

The instruction is also bad because it allows a recovery if deceased was killed while exercising ordinary care to avoid injury. An instruction, in such case, which limits the exercise of ordinary care to the moment of the injury, is bad. *Railroad Co. v. Roberts*, 44 Ill. App. 180; *Railway Co. v. Halsey*, 133 Ill. 248; *Railroad Co. v. Weldon*, 52 id. 290.

In so limiting the exercise of due care, plaintiff was allowed to recover on a showing of due care on the part of deceased

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Brief for the Appellant.

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much narrower than the allegations of the declaration in that regard.

Instruction No. 3 is the instruction of comparative negligence, and has no application in this case, because the plaintiff can not be said to have been in the exercise of ordinary care, considering the evidence as to the mode of injury. *Railroad Co. v. Johnson*, 103 Ill. 512.

The same instruction is also bad in allowing a recovery if defendant was negligent, without restricting the negligence to be considered by the jury to that alleged in the declaration. *Kranz v. Thieben*, 15 Bradw. 482; *Railroad Co. v. Mock*, 72 Ill. 141.

The same instruction is bad in not extending the time for the exercise of ordinary care and caution on the part of deceased to the whole act of crossing the sidewalk.

The fourth instruction for appellee is bad, first, because it confines the exercise of ordinary care on the part of the deceased to the time of his injury; second, because it admits of a finding of guilty under certain count or counts of the declaration as to which there is no negligence; third, because the latter half of the instruction allows a recovery on the negligence of the defendant, without restricting such negligence to that alleged in the declaration. *Kranz v. Thieben*, *supra*.

The court should have given the instruction asked by the defendant, marked 20, telling the jury to find for the defendant.

The court should have given the eighteenth instruction asked for by appellant, namely, that there was no averment in either of the first six counts of plaintiff's declaration that the deceased left a widow and next of kin, and for that omission there could be no recovery against defendant in either one of the first six counts in the declaration of the case. *Coal Co. v. Hood*, 77 Ill. 70; *Railroad Co. v. Morris*, 26 id. 403; 1 Chitty's Pl. \*412.

The instruction marked 22, for the appellant, should have been given. The declaration clearly charges that the deceased



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Brief for the Appellee. Opinion of the Court.

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was hurt by being struck by an engine of appellant. If the accident was occasioned by the deceased running into the cylinder of the engine and striking the engine on its side, then there was a fatal variance between the allegations of the declaration as to the mode of the occurrence of the injury, and the proofs. *Railway Co. v. Beam*, 11 Bradw. 215; *Railroad Co. v. Mockenstein*, 24 Ill. App. 131; *Bloomington v. Goodrich*, 88 Ill. 558; *Moss v. Johnson*, 22 id. 633.

Instruction marked 23, for appellant, should also have been given.

Messrs. CASE, HOGAN & CASE, and Mr. F. A. MITCHELL, for the appellee:

The stipulation referred to in the opinion of the Appellate Court can not be construed by this court without any oral evidence to contradict or vary the same, as being or intending anything different than therein set forth. In addition to the opinion of the Appellate Court upon this point, we cite in support of this motion, the cases of *Zielinski v. Remus*, 46 Ill. App. 596, and *Wilson v. Wilson*, 44 id. 209.

The plaintiff's first instruction was good. *Railroad Co. v. Payne*, 59 Ill. 534.

The words "at the time of the accident," found in an instruction, have relation to the entire transaction under examination. *Railroad Co. v. Fisher*, 141 Ill. 625; *Railway Co. v. Johnson*, 135 id. 641; *McNulta v. Lockridge*, 137 id. 270; *Railroad Co. v. Versten*, 41 Ill. App. 348.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

Appellee, in this court, moves to dismiss the appeal upon the ground that there is in the record no proper bill of exceptions. There is in this record what purports to be a bill of exceptions, properly certified by the trial judge to contain all the evidence offered or admitted upon the trial of the cause, by either party. The particular objection is, that it is the

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Opinion of the Court.

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original bill of exceptions. The statute (3 Starr & Curtis, 628,) provides that the parties to an appeal or writ of error may, by agreement, have the original bill of exceptions or certificate of evidence, instead of a copy thereof, incorporated in the transcript of the record made by the clerk of the court below, to be filed in the Appellate or Supreme Court upon such appeal or writ of error. Unquestionably, the original bill of exceptions can be used as part of the transcript of the record only upon agreement of the parties.

There was filed in the office of the clerk of the circuit court, entitled in that court and in the cause, the following stipulation: "It is hereby stipulated and agreed that the original bill of exceptions, instead of a copy, may be used in making up the record in the above entitled cause," which was duly signed by the attorneys of record of the respective parties. It is now said that the "record" does not come to the Appellate Court, and that as the parties did not stipulate that it should be used in making up the "transcript of the record," it is to be presumed that the stipulation referred to making up the record in the circuit court. The parties had nothing to do with making the record in the circuit court. The clerk of that court must necessarily file the original bill of exceptions and make it a part of the record in that court, and was not authorized to make a copy thereof a part of such record. It is therefore impossible that the parties could have referred to making up the record of the circuit court. An appeal from that court to the Appellate Court had been prayed and allowed, and it would seem too plain for serious contention that the agreement related to the transcript of the record to be made up on such appeal. Moreover, the parties themselves gave a construction to the agreement. The clerk appends his certificate to the transcript of record in the usual form, except stating that the original bill of exceptions is incorporated therein by stipulation of the parties. But for the stipulation and this statement in the certificate it could not be told

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Opinion of the Court.

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original, instead of a copy, had been used. In the Court the parties respectively submitted the case to without objection to the record, to be heard upon assigned, all of which go to the merits. The record court, filed in this, shows no motion by appellee, or n, that the record was not in every respect perfect and . The agreement is to be construed reasonably, and give effect to the intention of the parties in making it. is clear, in the light of the circumstances under which ment was made and the subsequent conduct of the that it was agreed and understood that the original ceptions should be incorporated in the transcript of rd to be used on said appeal, and was properly so ated under the stipulation. But if it was otherwise, ill not be permitted to trifle with the courts, by sub- their case upon the merits in the Appellate Court, a further appeal insisting upon mere technical objec- t going to the jurisdiction of the court, which might iled if interposed in apt time. The objection must, vent, on this appeal, be held to have been waived by mission of the cause in the Appellate Court.

estions of fact are to be regarded as settled adversely lant by the judgment of the Appellate Court, to which lone look for determining the grounds for its rendi- ounsel for appellant insist, that, by looking at the of that court, it will appear that the judgment of ice was really the result of its holding that there was f exceptions properly in the record. We are not per- o consider the opinion for that purpose, but if we were, tion of counsel is not sustained. The opinion holds, judgment should be affirmed upon the merits. Had rt, as suggested by counsel, affirmed the judgment of incompleteness of the record, without a consid- or determination of the errors assigned, it would un- ly have recited that fact in its final order, so as to

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Opinion of the Court.

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present the question, thus arising, to this court, on further appeal. That court is the ultimate trier of questions of fact, and parties have a right to its judgment upon the law and facts, in every case properly presented. In the event that court should affirm a judgment without considering the questions of fact tried in the court below, because of some defect in the record, by reason of which the errors assigned are not properly presented, it is clearly its duty to insert in its final order its finding, in such manner that its action may be the subject of review, otherwise, in a case in which it should be in error, the parties would be deprived of the benefit of its consideration and judgment upon the errors assigned upon the record. It is to be presumed that they would, in every proper case, discharge that duty.

The only questions arising upon the record, in this court, are questions of law.

It is first insisted that the facts show that the deceased was not in the exercise of due and ordinary care for his own safety. This argument was addressed to the Appellate Court, was proper for its consideration, and its determination of the fact is conclusive upon us.

It is next urged that the court erred in giving the first instruction asked on behalf of the plaintiff. The instruction was as follows:

"The court instructs the jury, that if they believe, from the evidence, that the plaintiff's intestate, while exercising ordinary care to avoid injury, was killed by the negligence of defendant, as charged in the declaration, then you can find for the plaintiff."

It is objected, that thereby the jury were left to consider the case, as charged in the declaration, while there was no evidence before the jury to prove the negligence alleged in one or more of the counts thereof. It is hardly to be supposed that the jury would understand the instruction to authorize them to consider negligence charged in the counts of the

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Opinion of the Court.

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declaration, not proved. They were to believe, from the evidence, that the intestate was killed by the negligence of the defendant, as charged, and were expressly told, in very many instructions, that they must form their judgment from the evidence. Moreover, by the instructions given on behalf of the defendant, the jury were told that there could be no recovery under the first and sixth counts of the plaintiff's declaration.

It is also urged that the instruction is faulty because it tells the jury that if the deceased was in the exercise of ordinary care, at the time, etc., to avoid injury, that will suffice, instead of requiring that they should find that he was in the exercise of ordinary care in entering upon the railroad tracks, etc. The instruction, we think, is not subject to the criticism. (*Chicago and Alton Railroad Co. v. Fisher*, 141 Ill. 625; *Railroad Co. v. Johnson*, 135 id. 641; *McNulty v. Lockridge*, 137 id. 270.) Be this as it may, in the fourth and fifth instructions on behalf of the defendant the correct rule was given, and they were told that, to entitle the plaintiff to recover, the jury must believe, from a preponderance of the evidence, that the deceased, at the time of and just prior to his receiving the injury, was in the exercise of due and ordinary care for his safety. In cases of this kind, where the party injured has been struck by a moving train while upon or attempting to cross railway tracks, it has been repeatedly held to be error to limit the requirement that he should be in the exercise of ordinary care, to the exact time of the injury. (*Illinois Central Railroad Co. v. Weldon*, 52 Ill. 290; *Chicago, Milwaukee and St. Paul Railroad Co. v. Halsey*, 133 id. 248.) The question of whether he exercised ordinary care in going upon the track is always necessarily involved. But in view of the instructions given, the first general and the others specific, as to what should be considered, the jury could not have been misled.

The objection to the third instruction is not well taken, for the reason that it requires the jury to believe, from the evidence, that plaintiff's intestate was in the exercise of ordinary

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Opinion of the Court.

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care for his own safety, and that the injury resulted from the negligence of the defendant. Slight negligence is not necessarily incompatible with due and ordinary care, and the effect of the instruction was to so inform the jury; and while the instruction attempts to state the doctrine of comparative negligence laid down in *Galena and Chicago Union Railroad Co. v. Jacobs*, 20 Ill. 478, and subsequent cases following that decision, it does not vitiate the instruction. We have repeatedly held, in effect, in the later decisions, beginning with *Calumet Iron and Steel Co. v. Martin*, 115 Ill. 358, that the doctrine of comparative negligence, as announced in the earlier cases, was no longer the law of this State, and it is to be no longer regarded as a correct rule of law applicable in cases of this character. (*Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Mansfield v. Moore*, 124 id. 133.) The doctrine announced in the later decisions, as applied to this class of cases, requires, as a condition to recovery by the plaintiff, that the person injured be found to be in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant.

It is next insisted that the fourth instruction is faulty for the same reasons that are assigned as to the first and third instructions, and precisely the same answer is applicable to this objection.

It is insisted that the court erred in refusing instructions marked 18, 20, 21 and 22, asked by appellant. The eighteenth instruction asked, stated that there was no averment in either of the first six counts of plaintiff's declaration, that the deceased, James Hessions, left a widow and next of kin, and that there could, therefore, be no recovery under either of said counts. The right of action is here given by the statute for the exclusive benefit of the widow and next of kin. It is the settled law that the fact of survivorship of a widow or next of kin is an essential element of the cause of action, and it is therefore indispensable that it should be alleged and proved.

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Opinion of the Court.

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(*Chicago, Rock Island and Pacific Railway Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, 77 id. 68; *Safford v. Drew*, 3 Duer, 627.) It is entirely proper for the pleader to state what is in reality the same cause of action, in several counts of the declaration, the purpose being to meet the varying phases of the evidence; but, where this is done, the counts are to be regarded as distinct from each other, and, by apt reference, or otherwise, must state a complete cause of action. (1 Chitty's Pl. 413.) It would seem to follow, necessarily, that the first six counts, standing independently of other averments in the declaration, were bad on general demurrer. The defendant, however, instead of demurring, pleaded to the declaration and submitted the cause for trial upon the issues thus formed. The several counts of the declaration, from the first to and including the seventh, each count upon the injury to plaintiff's intestate while in the exercise of ordinary care for his own safety, by being struck by a locomotive engine of appellant, from which he died, setting up in the various counts different acts of negligence or omissions of duty of the defendant, the failure to give proper signals, failure to close the gates across approaches to its tracks upon which intestate was walking, etc., running the train at a high and unlawful rate of speed, failure to stop the train, etc., and alleging, that by reason of the negligence of the defendant, plaintiff's intestate, while in the exercise of due and ordinary care, was struck by the engine of defendant and killed. At the end of the declaration it is then alleged that the deceased left him surviving, at his death, plaintiff, his widow, and Maggie, Julia A. and Nellie Hessions, his daughters, and James Hessions, Jr., his son, who were next of kin. Proffert of letters of administration to plaintiff is then made in the usual form, immediately preceding the conclusion, to the damage of plaintiff as administratrix, etc. (1 Chitty's Pl. 420.) The matter here alleged was common to all the counts in the declaration, and the pleader, instead of alleging the fact of survival of next of kin in each

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Opinion of the Court.

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count, alleged that fact in apt language at the conclusion of the counts. It is unnecessary for us to determine what would have been the effect on demurrer. It is the settled doctrine, that many defects which might have been fatal on demurrer, are waived and cured by pleading over. *United States v. Morris*, 10 Wheat. 286; 1 Chitty Pl. 671, *et seq.*

The defect, here, is in the manner of pleading, and not in matter of substance, for, confessedly, if the same allegation had been inserted in each count, or in one, with apt reference to that count in the others, they would have severally stated a good cause of action. As already seen, the fact that plaintiff's intestate left him surviving next of kin was an essential element, which must be alleged and proved, to entitle plaintiff to recover. The pleader alleged in each count, the death and the negligence from which it resulted, and sought by the general allegation following all the counts, to supply the allegation of survival of next of kin. While the intendments that are indulged after verdict do not apply, yet the rule seems to be that after plea pleaded, the declaration will receive a reasonable construction. Broom's Law Maxims, (5th Am. ed.) \*535. It is manifest that the allegation that the plaintiff's intestate, "at his death," left the persons named his next of kin surviving, is applicable to all the counts of the declaration. There is no ambiguity or uncertainty in the allegation of the fact that "at his death" he left next of kin for whose benefit the action would accrue, whether his death resulted from the negligence charged in one count or in another. This allegation no more applies to his death because of the negligence charged in the seventh count, than it does to his death if resulting as alleged in the preceding counts. No language is employed restricting the allegation to the seventh count, and nothing is urged except that it follows immediately thereafter.

It would have been better pleading, probably, to allege in the first count the survival of the widow and next of kin as



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Opinion of the Court.

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one of the essential elements constituting the cause of action, and either by repeating it, or by express reference in the subsequent counts, have made the allegation thereof in the first a part of each subsequent count. But where the death is alleged in each count, and the declaration contains the general allegation of the survival of next of kin, which, if proved, must exist as a fact at the time of death thus alleged, no reason is perceived why the general allegation should not be held to apply to each count, as if specifically incorporated in it. The defendant was thereby fully apprised of the cause of action, and could not be surprised by proof of the existence and survival of next of kin at the time of the death alleged.

We are of opinion that the court correctly refused the instruction under consideration. But if this position is not sustained, it is apparent that appellant was not prejudiced by the refusal of the instruction, for the reason that the seventh count contained, in substance, the allegations of negligence specifically charged in the other six, and it is admittedly sufficient to support the recovery.

It is urged that the court erred in refusing to give the instruction marked 20, which was simply to find for the defendant. This instruction can only be given when the evidence, with all the inferences legitimately arising thereon, is insufficient to authorize a verdict for the plaintiff. If there is any evidence tending to sustain the issues in plaintiff's behalf, the weight and degree of credit to be given to it must be submitted to the jury. (*Phillips v. Dickerson*, 85 Ill. 11; *Purdy v. Hall*, 134 id. 298; *Pullman Palace Car Co. v. Laack*, 143 id. 242.) It is insisted that the instruction should have been given, at least for the reason that the deceased was guilty of contributory negligence, and was not in the exercise of ordinary care for his own safety. The only question that can arise in this court is, whether there was any evidence tending, or the circumstances shown were such as tended, to establish a right of recovery. A discussion of the evidence will serve no purpose.

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Syllabus.

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We have carefully examined it, and while the case is somewhat close, we are unable to say that the circumstances proved were not such as tended to establish negligence on the part of the defendant, or that there was no evidence tending to show that plaintiff's intestate, at and just prior to his injury, was in the exercise of such care for his own safety as would be exercised by a reasonably prudent person under all the circumstances shown.

The twenty-first, twenty-second and twenty-third instructions, so far as proper to be given, are fully covered by instructions given at the instance of appellant, and it was not error for the court to refuse them, for that reason, if for no other.

It is next insisted that the damages were excessive. That has been so repeatedly held to be an error which can not be assigned in this court, no citation of authority will be necessary.

Finding no substantial error in the record, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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SARAH PRIDY *et al.*

v.

AMANDA GRIFFITH *et al.*

*Filed at Mt. Vernon June 19, 1894.*

1. DOWER—coal mines—waste. It is a well established rule of law, that a person occupying land as dower can not commit waste upon such land, and that the opening of coal or other mines thereon amounts to waste, but it is equally well settled in this State, that when mines are already opened upon land assigned as dower, the widow has the right to operate the same and receive the proceeds thereof.

2. A widow may be endowed of mines opened by the heir or owner of the fee after her dower attaches, and before there has been any assignment. It is not waste for her to work mines opened, although the same have been abandoned before the death of her husband. She may construct new approaches and not be guilty of waste.

3. SAME—in leased lands—contract for opening mines—rents and royalties. Where there is a valid, subsisting contract, executed by the

## Statement of the case.

his lifetime, under which the lessees may open the mines, terms of which one dollar per acre rent or royalty is to be paid to the lessor, his heirs or other legal representatives at any time, shall be legally entitled to the life estate in or fee to the land until the mines are opened, and certain fixed term after the mines are opened and worked, the widow of the deceased is entitled to the rent or royalty upon lands assigned as part of the assignment of her dower.

And the lessees open mines upon lands assigned as dower, with the consent of the widow, she will be entitled to the royalty on the lease. In such case, the act of opening the mine would be the act of the husband, viz., authorized by him.

As to the coal lands for mining purposes, after fixing the royalty on coal raised, provided that until actual mining operations commenced, the lessee, or its successor or assigns, should, on the 1st of January, pay the lessor, or those succeeding to his rights, for each acre of the tract leased out of which no coal at the time should be raised: *Held*, that the widow of the lessor was entitled to the one dollar per acre after the assignment of her dower, and the opening of the mines, if any were opened on her lands, after which she should receive the royalties mentioned in the lease, and the one dollar per acre was to be treated as the annual rental for lands not mines.

**PER ERROR** to the Circuit Court of Williamson county; A. K. VICKERS, Judge, presiding.

The writ of error brings in review the action of the Williamson county circuit court, at the February term, 1892, in which it was held that the annual rental per acre, or compensation, payable by the lessees of coal and other mining privileges under a lease made during the lifetime of the deceased husband, should not be paid to the widow as to the land allotted to her as homestead and dower, but that during the continuance of the widow's life estate in the land covered by her homestead and dower, the royalty or rent could be paid to the heirs or their assigns.

In 1871, Tinsley Priddy (the deceased ancestor and his wife, the present widow, Sarah Priddy, by deed conveyed to her all coal, minerals, and rights of opening and operating the lands hereinafter mentioned, to A. Connor, Administrator.

150 ILL.

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Statement of the case.

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drew C. Bryden and Frank J. Chapman. These mining rights, by assignment, came afterward to be owned by the Carbon-dale Coal and Coke Company, a corporation, and on the 8th of March, 1873, the assignee and lessors or grantors made a new contract, which took the place of the one of March, 1871, and covered the same lands, and which are described as follows: The north-west quarter of the south-west quarter, the south-west quarter of the south-west quarter, the south-west quarter of the north-west quarter, and the west half of the south-east quarter of the south-west quarter of section 34, township 8, south, range 1, east of the third principal meridian, in Williamson county, Illinois. The lease conferred all mining rights, etc., in the broadest terms, upon the grantees, and provided for the compensation to be paid after mining began, at five cents per ton, etc. But such provisions are unimportant, as, so far, mining operations have never been begun, but the compensation provided for, till mining began, was covered by the following language in the last contract: "And until actual mining operations are commenced, as is specified in the aforesaid recorded instrument, the said party of the second part, its successors or assigns, shall pay on the first day of January, to said party of the first part, their heirs or other legal representatives who, at the time, shall be legally entitled to the life estate or the fee simple ownership of the land, the sum of one dollar for each acre of the tract or surveyed subdivision out of which no coal shall at that time have been mined and removed, and all payments of rent so made shall be credited and allowed as an advance payment of the royalty of five cents per ton of two thousand pounds, reserved as aforesaid, and shall be deducted, without interest, in installments, not exceeding at one time, when deducted, one-half of the whole sum due in the monthly payment for the royalty from which said installment is deducted."

Tinsley Priddy died in April, 1885, residing on this land with his family as a home. The property right in this coal

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Statement of the case.

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ing lease, with the other assets of the Carbondale

Coke Company, afterwards, by the action of the United States Circuit Court, was placed in charge of a receiver to administer the suit of certain creditors, and owing to some default of the receiver, the annual royalty of a dollar was not paid the first of each January, under the grant or lease, and the widow and heirs of Tinsley filed a bill to cancel said lease, under the right of forfeiture upon the failure of such payments. The result of this was, that the United States Circuit Court refused to set aside the forfeiture on account of the receiver's inability to make the annual payments, but ordered the payment by the receiver of all arrearages, etc. In this way there has been created a fund of \$1022 of rents or royalties that have accrued under the lease.

The plaintiffs in error, on the first of September, 1891, filed their bill in this case in the Williamson county circuit court at the September term, 1891, seeking the assignment of the land and homestead to the widow, and the partition of the land under said land among the heirs or their assigns, the distribution of the mining royalty accumulated, and a declaration of the rights of the parties as to the future distributions of royalty arising out of the land under the mining contract. On the first day of January, 1892, the Cartersville Coal Company, which has become the assignee of the mining lease, paid into the hands of the clerk of the circuit court the \$140 stipulated royalty which fell due for the year 1892. The only parties to the suit are the Sarah Priddy, and the heirs of Tinsley Priddy, defendants, and their husbands and wives, and the Cartersville Coal Company, William W. Barr, and J. J. Griffith, who, in the bill, are set out as being the husband of one of the daughters, had no interest in the shares of three of the heirs, after, however, the accumulation of some of the royalty, which still requires to be paid by the parties, as to that feature.

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Statement of the case.

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At the September term, 1891, the circuit court found and declared the rights of the parties in the land, and appointed commissioners to assign the dower and homestead of the widow, and partition the remainder to the heirs or their assigns. The commissioners reported at the same term, showing an assignment to the widow of twenty-five acres, being off the north end of the south-west quarter of the south-west quarter of section 34, township 8, south, range 1, east of the third principal meridian, as her homestead, and forty-two acres, being seven acres off the south end of the north-west quarter of the south-west quarter, and fifteen acres off the south part of the south-west quarter of the south-west quarter, and the west half of the south-east quarter of the south-west quarter of section 34, township 8, south, range 1, east of the third principal meridian, as dower out of the remainder, and the remainder not embraced in the dower and homestead was finally sold, not being susceptible of partition, etc. But no complaint is made as to any action relating to the sale, but the question concerning the disposition of the royalty accumulated, and thereafter to accumulate, under the mining lease, was postponed from the September term, 1891, to the February term, 1892, and at the February term, 1892, the court made and declared its findings upon the royalty question, finding that the royalty for the year 1885, due when Priddy died, should be treated as personalty, and it is disposed of in a manner that is satisfactory to all parties, both plaintiffs and defendants in error; but as to the royalties or rents for the years following 1885, the court decreed that the widow had no rights therein, and likewise that the future royalties on the whole lands, including that assigned as dower and homestead, should be the property of the heirs or other assigns, and the widow was entitled to no portion of such royalty. To this action of the court relating to the rent or royalty, the widow, Sarah Priddy, and others, prosecute this writ of error.

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Briefs of Counsel. Opinion of the Court.

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CLEMENS & WARDER, for the plaintiffs in error:

low was dowerable of the mines opened and worked isband. 4 Kent's Com. 41; 1 id. 210; 5 Am. and y. of Law, 890; 3 Waite's Actions and Defenses,

he mine is opened for the first time by the heir after of the ancestor, the widow will be entitled to roy- e land set off to her. *Lenfers v. Henke*, 73 Ill. 405. lemand by the widow for assignment, or after the by her of suit for assignment, which, in law, is a de- ie is entitled to damages from the date of such de- ich damages are one-third of the rentals of the whole he land. *Bonner v. Peterson*, 44 Ill. 253; *Schnebley ley*, 26 id. 116; *Atkin v. Merrill*, 39 id. 62; *Stowe* 45 id. 328; *Lennahan v. O'Keefe*, 107 id. 620; *Pey- fries*, 50 id. 143; *Strawn v. Strawn*, id. 256; *Cool v.* 13 Ill. App. 560; *Walker v. Walker*, 5 id. 289.

A. SCHWARTZ, for the defendants in error:

assignment a widow's right of dower is inchoate, will not be entitled to the rents and profits. *York v.* Ill. 526; *Strawn v. Strawn*, 50 id. 256; *Reynolds v.* , 100 id. 356; *Green v. Massie*, 13 id. 364; *Gartside* , 58 id. 212.

aste for the dowress to open and operate a mine be- assignment of her dower. 4 Kent's Com. 41; *Merritt* tt, 97 Ill. 249.

artition act respects the separate estates of the widow s in the homestead premises. *Jones v. Gilbert*, 135

JUSTICE BAKER delivered the opinion of the Court:

is no objection urged against the decree assigning : partition of the land. The only question presented ourt by the record is, did the circuit court err in hold-

## Opinion of the Court.

ing that the widow was not entitled to the rents or royalties due and to become due by the terms of the foregoing lease from the coal company.

It is a well established rule of law, that a person occupying land as dower can not commit waste upon such land, and that the opening of coal or other mines thereon amounts to waste. But it is equally well settled in this State, that where mines are already opened upon land assigned as dower, the widow has the right to operate the same and receive the proceeds thereof. (*Lenfers et al. v. Henke et al.* 73 Ill. 405, and cases there cited.) It is true, in this case the mines have not been actually opened upon the lands assigned as dower, but there being a valid subsisting contract, executed by the husband in his lifetime, under which the lessees may, at any time, open the mines, and by the terms of which one dollar per acre rent or royalty is to be paid annually to the lessor, his heirs or other legal representatives who, at the time, shall be legally entitled to the life estate in or fee simple title to the land, until the mines are opened, and certain fixed royalties after the mines are opened and worked, it seems clear to us, that in justice the widow is entitled to that rent or royalty after the assignment of her dower. Should the lessees open mines on the lands assigned as dower, as by the terms of the lease they may, without the consent of the widow, she certainly would, upon the principle announced in the above cited case, be entitled to the royalty named in the lease. The act of opening the mine would, in such case, be practically the act of the husband, viz., authorized by him. Then, in contemplation of law, for the purposes of this case the mine may be treated as already opened when the widow's right of dower attached.

In the case of *Lenfers et al. v. Henke et al. supra*, the question was, had the widow the right to the mineral rents and profits of mines opened by the owner of the fee after the right of dower had attached. This court said: "On principle, why may she not be endowed of mines opened by the heir or owner



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Opinion of the Court.

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of the fee, after dower attaches and before there has been any assignment? By all the decisions it is not waste for her to work mines opened, although the same had been abandoned before the death of her husband. She may construct new approaches and not be guilty of waste. On the same principle, if the cases on this question can be said to rest upon any principle, she could work mines opened by the heir without being guilty of waste, \* \* \* there is no reason why the wife may not be entitled to be endowed of mines opened by the heir or owner of the fee after the right of dower attaches and before there has been any assignment, as well as in mines opened by the husband."

We think, upon the reasoning of said case, appellant is entitled to the one dollar per acre after the assignment of her dower and until the opening of mines, if any are opened, on her land, after which she should receive the royalty mentioned in the lease. It is also clear from the terms of the lease under which the fund in question accrued, that the one dollar per acre rent, to be paid until the mines should be opened, is to be treated as the annual rental for lands, and not mines, and if so treated, appellant is clearly entitled to the rent arising from the land set off to her by the assignment of her dower.

The bill in this case seeks the distribution of funds accruing before and after the assignment of dower. As to that part accruing before the assignment, no right exists in the widow, but for the reasons stated she should receive all that has accrued or will accrue, during the continuance of her life estate, from the lands set off to her by the assignment of her dower and homestead.

The decree of the circuit court will be reversed, and the cause will be remanded to that court, with directions to enter a decree in conformity with the views here expressed.

*Decree reversed.*

## Syllabus.

H. F. LEOPOLD *et al.*

v.

THE CITY OF CHICAGO.

*Filed at Ottawa June 19, 1894.*150 568  
161 112150 564  
171 263  
150 568  
76a 544150 568  
84a 576150 568  
189 \*444150 568  
115a \*206

1. **EMINENT DOMAIN—compensation for damage to property not taken.** The provision in section 13, article 2, of the constitution, which prohibits the damaging of private property for a public use without making just compensation, is equally mandatory with that against taking private property for public use without making just compensation, and renders unlawful every such damaging unless the compensation be fixed and ascertained by a jury. And ample provision must be made by law, so that the owner shall receive payment of compensation without unreasonable and vexatious delay.

2. **SAME—set-off of benefits.** No supposed benefits to the property not taken can be set off against the compensation to be paid for the land actually taken, but in respect of damages to land not taken, special benefits to the property damaged may be set off against the damages accruing to the property.

3. **SAME—supplemental proceeding—re-litigation of damages to property not taken.** A judgment in a proceeding by a city to condemn a part of a lot for a street is final and conclusive upon the parties as to the compensation to be paid for the part taken, and damages to the residue; and upon a supplementary proceeding to raise money to pay such compensation, the question of damages to the lot not taken, and fair and just compensation for the part taken, can not be re-litigated.

4. The issue to be tried in the proceeding for the confirmation of the assessment, precludes the idea that damages to the lot owner by reason of the taking of a portion of his property are to be considered. The commissioners appointed to spread the assessment are required, simply, to deal with the lot as they find it, the damages from the taking having, in theory, at least, been determined in the condemnation proceeding.

5. **SAME—payment of damages by benefits—assessing land twice for benefits.** Where benefits are set off against damages to the part of the land not taken, in a proceeding to condemn for a street, an attempt to raise money to pay for the property taken or damaged, by the assessment of special benefits on the same land, under section 23 of article 9 of the City and Village act, and thus require the owner to pay the benefits twice, is in palpable violation of the constitution.

6. The recovery of the special benefits in a condemnation proceeding will estop the city from again imposing the same, by way of special

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 Statement of the case.
 

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t, upon the same property. The land owner can not be re-  
 twice pay the special benefits to his property.

*JUDICATA—when causes of action are different.* Where some  
 fact or matter material to the determination of two causes  
 has been adjudicated in a former proceeding in a court of  
 jurisdiction, and the same fact or matter is again at issue  
 between the same parties, the adjudication of the fact or matter in the  
 first properly presented, will be conclusive upon the same ques-  
 tion in the latter suit, irrespective of whether the cause of action is the  
 same in both suits or not.

In the case at bar, the city filed its petition for condemnation of a part of a lot,  
 and the lot owner filed a cross-petition for damages to the  
 part of the lot not taken, and the owner offered proof of damages, and  
 offered evidence showing benefits to the remainder of the lot,  
 and the jury found no damages, it was held, in a proceeding by the city  
 for benefits on the part of the lot not taken, that the land could  
 not be assessed a second time for the benefits accruing from the im-  
 provement.

*Parol evidence—to show matter litigated in prior suit.* It is  
 not sufficient, where a judgment is relied on as a bar to a sub-  
 sequent suit, that the issues are the same in both cases; but where  
 the adjudication of some material fact or matter is relied upon as an  
 issue between the same parties, parol evidence of what occurred  
 in the former trial,—what was actually submitted and determined,—  
 is admissible.

Filed from the Superior Court of Cook county; the Hon.  
 F. BLANKE, Judge, presiding.

An ordinance was passed by the city of Chicago for open-  
 alley from Seventy-third to Seventy-fourth street, and  
 between Yates and Bissell avenues, in said city. The  
 city filed its petition November 25, 1892, in the Superior  
 Court of Cook county, praying that ascertainment be had of  
 the compensation to be made to property owners for  
 property to be taken and damaged therefor. On April 15,  
 1893, the verdict of a jury, just compensation was ascer-  
 tained as to the several lots, etc., aggregating the sum of

On July 6, 1893, the city of Chicago filed its supple-  
 mentary petition, asking that an assessment of benefits be  
 made upon property benefited, to raise that sum, together with

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Statement of the case.

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costs, etc., and that commissioners be appointed to make the assessment. An order was made appointing commissioners, and finding the cost to be \$169, and the probable further cost to be \$400, and ordering the same to be assessed upon the property benefited, so far as the same could be done, etc. Commissioners reported an assessment roll, apportioning the entire sum of judgment and cost as benefits to property assessed, the assessment upon appellants' lot, No. 21, being \$170. Objections were filed by appellants to the confirmation of the assessment roll, which were overruled by the court, and exceptions taken. In the view taken, consideration of these exceptions is deemed unnecessary.

Upon the hearing, the city introduced in evidence the assessment roll, and evidence tending to show that lot 21 was not assessed more than it would be specially benefited, nor more than its proportionate share of the cost of the proposed improvement. The objectors offered in evidence the petition for condemnation filed by the city, praying for the ascertainment of just compensation for property taken and damaged; the cross-petition of appellants, alleging that by reason of taking ten feet off said lot for said alley the remainder of said premises would be damaged to the extent of \$1000, and praying compensation, etc.; the instructions to the jury in that cause, given by the court, by which it appears that the court instructed the jury, on behalf of the city, "that in determining whether the taking of a portion of a lot materially impairs the market value of the remaining part, the jury must consider all special benefits, if any, which the remaining part will derive from the proposed improvement, taken as a whole;" the verdict of the jury, awarding to owners of lot 21, for property taken, \$50, and for damages to property not taken, nothing; and the judgment rendered upon said verdict, finding the just compensation to be as returned by the jury. Appellants then called a witness, and were proceeding to interrogate him, when counsel for the city asked what they

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Opinion of the Court.

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r expected to prove by the witness. Counsel for ap-then stated to the court, in answer, that he expected osed to prove that upon the trial in the condemna-eeding appellants introduced evidence to the jury of ages, and extent thereof, to the part of lot 21 not id that the city introduced evidence tending to show special benefits accruing from the improvement, to of the lot not taken, would equal the damages sus-y it, and that therefore said remainder of said lot t be damaged, whereupon the counsel for the city to the introduction of said evidence, as incompetent e issue being tried, which objection the court sus-and appellants excepted.

. W. BECKER, for the appellants.

LOCKWOOD HONORE, Mr. WILLIS E. THORNS, and Mr. LUBENS, for the appellee.

USTICE SHORE delivered the opinion of the Court:

uestion presented is of great importance, and has not ectly passed upon by this court. Section 13, article onstitution, provides that private property shall not or damaged for public use without just compensation ade to the owner. We need not pause to notice the leading to the insertion in the present constitution ibition against the damaging of private property for ses without just compensation. (*Penn Mutual Life v. Heiss*, 141 Ill. 35.) The provision is equally man-with that against taking private property for public out making just compensation, and renders unlawful ch damaging unless compensation be fixed and ascer-y a jury. And it is everywhere held that certain and rovision must be made by law, so that the owner shall payment of the compensation thus ascertained, with-reasonable or vexatious delay. *Gardner v. Village of*

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Opinion of the Court.

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*Newburg*, 2 Johns. Ch. 162; *Chapman v. Gates*, 54 N. Y. 132; *People v. Hayden*, 6 Hill, 359; *Insurance Co. v. Heiss*, *supra*; *Cooley's Const. Lim.* 693; 2 *Dillon on Mun. Corp.* 615.

In this State no supposed benefits to the property not taken can be set off against the compensation to be paid for the land actually taken, but in respect of the damages to land not taken for the public use, special benefits to the property damaged may be set off against the damages accruing to the property. (*Cemetery Ass. v. Railroad Co.* 121 Ill. 199, and cases there cited). In the condemnation proceeding, the court properly instructed the jury, as we have seen it did, that in determining whether the taking of a portion of the lot materially impaired the value of the remaining part not taken, the jury must consider all special benefits accruing from the proposed improvement to the part not taken. If it be found that the special benefits thus accruing equal the damages, the owner can recover nothing; if, however, the benefits are less than the damages occasioned, the owner will be entitled to recover the excess as his just compensation for the damage to his land, and provision must be made for the payment thereof. *Goodwillie v. City of Lake View*, 137 Ill. 51.

It therefore affirmatively appears, that in the condemnation proceeding the special benefits accruing to appellants' lot not taken was in issue, and was submitted by the court to the jury in determining the issue raised by the cross-petition. The jury were required to find whether the taking of a part of the lot would depreciate the value of the part not taken,—that is to say, whether the part of the lot not taken was less valuable than it would be as a part of the whole lot. As said in *Hyde Park v. Washington Ice Co.* 117 Ill. 236: "If the jury had found there was no depreciation," (as they did here,) "they may have reached that conclusion because the benefits equaled or exceeded the depreciation. If they found that the property was depreciated, they may have reached that conclusion because the benefits were less than the depreciation pro-

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Opinion of the Court.

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Either finding involved a consideration of benefits." (*Washington Ice Co. v. Chicago*, 147 Ill. 327.) The order rendered in that proceeding was a final judgment, binding and conclusive upon the parties until reversed or set aside by some direct way known to the law; and the question as to appellants' property not taken,—that is, whether compensation allowed was just compensation or not,—cannot be re-litigated in this supplementary proceeding. (*City of Chicago v. City of Lake View*, *supra*.) The issue to be tried in this proceeding for confirmation of the assessment precludes the claim that damages to the lot owner by reason of the taking of a portion of his property are to be considered. The commissioners appointed to spread the assessment are required simply, to deal with the lot as they find it,—that is, with the lot, whether or not taken,—and upon it the benefits that will accrue to it from the improvement, and are not authorized to take into consideration depreciation of such lot occasioned by taking part of it, or damages accruing in consequence of such taking having, or not, at least, been determined in the condemnation proceeding.

And the same is precisely true in respect of the issue to be tried by the jury.

It is said, however, that there can be no estoppel by judgment, on the ground that the causes of action are not identical in the two proceedings. This, if it be conceded, is not sufficient to overcome the estoppel. Where the former adjudication operates upon as an absolute bar, there must be, as between the two actions, identity of parties, of subject matter and of the cause of action. There is, however, a clearly defined distinction between that class of cases, and where some controlling matter material to the determination of both causes, was adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again in issue between the same parties. In this latter case, the determination of the fact or matter in the first suit will, if prop-

## Opinion of the Court.

erly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not. This is generally denominated estoppel by verdict. This distinction is clearly stated in *Hanna v. Read*, 102 Ill. 596, *Wright v. Griffey*, 147 id. 496, and *Attorney General v. Chicago and Evanston Railroad Co.* 112 id. 520. In the latter case the late Mr. Justice SCHOLFIELD, after quoting from the case of *Hanna v. Read*, said: "This doctrine is limited to matters necessarily involved in the litigation, but it is equally applicable whether the point was, itself, the ultimate vital point, or only incidental, but still necessary to a decision of the case."

In condemnation proceedings there is and can be no formal pleadings other than the petition and cross-petition, and, as we have seen, the question of whether special benefits accrued to the property not taken, by reason of the improvement, was necessarily included in the issue submitted to the jury, in determining the amount of compensation to be paid for the land damaged but not taken. As said in *Washington Ice Co. v. Chicago*, *supra*: "If the special benefits equal or exceed the damages, the owner can recover nothing as damages to property not taken; if less, he will recover the difference, only." It is clear, therefore, that in the condemnation proceeding it was competent for either party to offer evidence upon the subject matter of special benefits, by reason of the improvement, to the part of appellants' lot not taken, and for the jury to consider the same in determining the compensation to be paid for damages to such part of the lot by reason of taking the residue for the public use.

It might be, however, that the jury found that the lot was not damaged at all, and thereupon were warranted in finding and returning a verdict of no damages to property not taken,—that is, while it was within the issue, the matter of special benefits might not have been considered by the jury. The parol evidence offered and excluded was offered for the purpose of



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Opinion of the Court.

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showing that damages to the part of the lot not taken were in fact proved upon the one side, and the evidence was met by the city, upon the other, by proof tending to show that the special benefits arising from the improvement to the part of the lot not taken, equaled or exceeded the damages proved. It is ordinarily sufficient, where a judgment is relied upon as a bar to a subsequent suit, that the issues were the same in both cases; but where the adjudication of some material fact or matter is relied upon as an estoppel between the same parties, parol evidence of what occurred on the former trial, —what was actually submitted and determined,—is always admissible. *Wright v. Griffey*, *supra*; *Palmer v. Sanger*, 143 Ill. 34; *Herman on Estoppel*, secs. 111, 211; *Sturtevant v. Randall*, 53 Me. 149; *Parker v. Thompson*, 3 Pick. 429; *Packet Co. v. Sickles*, 24 How. 333; *Perkins v. Walker*, 19 Vt. 144; *Burt v. Sternburg*, 4 Cowen, 559; *Gardner v. Bucklee*, 3 id. 120.

Section 53 of article 9 of the Cities and Villages act authorizes the filing of a supplemental petition, praying the court to cause an assessment to be made for the purpose of raising the amount necessary to pay the compensation and damages which may be or shall have been awarded for the property taken or damaged in the condemnation proceeding, and the like proceedings in making the assessment shall be had, and the assessment is to be made, collected and enforced in the same manner, as is provided in the article for making special assessments. It is thereby attempted to provide the fund out of which compensation for the property taken and damaged shall be paid. It is clear that in the condemnation proceeding a part or the whole of the special benefits accruing by reason of the improvement to the part of the lot not taken has been set off against the damages. The owner may recover nothing as compensation, because the benefits equal the damages. It is manifest that to so construe section 53, in such a case, that the benefits arising from the improvement shall be assessed upon the lot damaged, is to require the owner to pay

## Opinion of the Court.

the benefits twice,—first to receive them in discharge of his just compensation, and secondly, to pay them as an assessment upon his property. The effect would necessarily be, that in the statute authorizing the taking and damaging of his land for a public use and providing compensation therefor, the compensation is taken away, in palpable violation of the provision of the constitution. No such construction of the section is necessary. It can find ample operation in cases where special benefits have not already been paid.

It is suggested that much inconvenience may arise if property, a part of which has been taken, can not be included within the assessment. We find no occasion for discussing or determining the question thus suggested, but if it be true, the argument of inconvenience, can not be heard to sustain a clear violation of a constitutional right guaranteed to the property owner. But it will possibly be found, in practice, that the provisions of section 53 will apply in making assessments upon all property benefited, including property damaged but not taken, when the damages in the condemnation proceeding have been ascertained, without setting off against them the special benefits. We need not, however, enter further upon this subject. It is clear that the lot owner could not be required to twice pay the special benefits to his property. A rule requiring it would impose an unjust and unequal burden upon the citizen,—an unwarrantable exaction, unauthorized by law; and it therefore follows that the recovery of the special benefits in the condemnation proceeding would estop the city from again imposing the same by way of special assessment upon the property. *City of Bloomington v. Latham*, 142 Ill. 462.

We are of opinion that the court erred in excluding the record in the condemnation proceeding and the offered evidence, and it will not be necessary to consider other errors assigned.

For the error indicated, the judgment of the Superior Court will be reversed and the cause remanded.

*Judgment reversed.*

## Syllabus. Opinion of the Court.

H. BERGHOFER

v.

JOHN FRAZIER.

150	577
108	329
150	577
189	*682
f189	*688
f189	*688

*Filed at Mt. Vernon June 19, 1894.*

1. **BOUNDARY LINE**—*fixed by parol agreement of the parties.* A parol agreement as to a division line between two tracts of land, not followed by possession in accordance with such line, will not pass title, or authorize ejectment by one party against the other.

2. It is well established that the owners of adjoining tracts of land may, by parol agreement, settle and establish, permanently, a boundary line between their lands, which, when followed by possession according to the line so agreed upon, is binding and conclusive between them and their grantees.

3. In such case, the line is established, not by transfer of title of either to the other, as that can only be done by deed properly executed, but such settlement determines the location of the existing estate of each, and, when followed by possession and occupancy, binds them, not by way of passing title, but as determining the true location of the line between their lands.

4. **SAME**—*established by agreement—estoppel to dispute.* Where the owners of adjoining premises have agreed upon the line, or agreed upon a mode by which it shall be determined, and have accepted and acquiesced in it by the unequivocal act of taking possession according to the line, they and their grantees are estopped from afterwards disputing it.

5. **NEW TRIAL**—*on the evidence.* The finding of the facts by the court trying an action of ejectment without a jury, will not be disturbed, on appeal, unless clearly against the weight of the evidence.

APPEAL from the Circuit Court of St. Clair county; the Hon. A. S. WILDERMAN, Judge, presiding.

Mr. R. W. ROPIEQUET, for the appellant.

Mr. JAMES M. HAY, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was an action of ejectment, by appellant, against appellee, in the circuit court of St. Clair county, to recover a

## Opinion of the Court.

strip of land twenty-three feet wide at one end and running to a point at the other, claimed to be a part of survey No. 73 of the Common Fields, Cahokia. The cause was tried by the court without a jury, resulting in a finding that defendant was not guilty, and a judgment against the plaintiff for costs.

Plaintiff relies for reversal of the judgment upon two grounds. First, that the evidence shows that he and his immediate grantor of survey No. 73 were in the actual occupancy of the strip in question for more than twenty years prior to the alleged unlawful entry by the defendant. In respect of this contention it must be said that the evidence is conflicting and irreconcilable, the question of occupancy depending upon the location of fences or a fence, made of logs, removed many years ago. The court, sitting as a jury, heard the testimony of the witnesses, with opportunity to observe their demeanor and bearing, and had means of determining their credibility and the weight that should be given their evidence which we do not possess. It has been uniformly held, in such cases, that the finding would not be disturbed, on appeal, unless clearly against the weight of the evidence, and such, we can not say, is the case here. *Ogilvie v. Copeland*, 145 Ill. 98, and cases there collated.

The second ground relied upon is, that before the bringing of this suit there had been a parol adjustment and practical location of the line of said survey No. 73 between plaintiff and defendant, who was adjoining owner. It is sufficient to say in respect of this contention, that if it be conceded that the parol agreement between the parties, as adjoining owners, authorized the finding of the division line in the manner pursued, it would not follow that ejectment would lie to recover the land in question. The title to the land would not pass under the agreement, and to make it effective by way of estoppel, it was necessary that the line established by agreement should be followed by possession according to that line. *Yates v. Shaw*, 24 Ill. 367; *Bauer v. Gottmanhausen*, 65 id.

## Opinion of the Court.

*rr v. Hitt*, 75 id. 51; *Cutler v. Callison*, 72 id. 113; *Bennehoff*, 121 id. 426; *Bloomington v. Cemetery Ass.* 221.

principle is well established, that the owners of adjoining parcels of land may, by parol agreement, settle and permanently a boundary line between their lands, which, followed by possession according to the line so agreed binding and conclusive upon them and their grantees. It is established, not by transfer of title of either to the estate that can only be done by deed properly executed such settlement determines the location of the estate of each, and, when followed by possession and occupancy, binds them, not by way of passing title, but as settling the true location of the boundary line between lands. Having agreed upon the line, or agreed upon a way which it shall be determined, and having accepted and acquiesced in it by the unequivocal act of taking possession according to the line, they and their privies are estopped afterwards disputing it. The estoppel arises from the fact that the parties in taking possession and occupying their respective tracts to the line thus agreed upon and determined. In this case at bar the defendant at once repudiated the line claimed, and retained possession of the strip of land in controversy, and there has been no possession acquired or taken by the plaintiff according to the line claimed to have been established by the agreement of the parties. It is therefore established that there has been no practical location of the line by the parties are estopped. The agreement of the parties, even if in writing, was ineffectual to pass title to land, and the legal remedies plaintiff may have thereunder, it is insufficient to authorize a recovery in ejectment. There is no substantial error in this record, and the judgment will be affirmed.

*Judgment affirmed.*

## THE EAST ST. LOUIS CONNECTING RAILWAY COMPANY

v.

JAMES O'HARA.

*Filed at Mt. Vernon June 19, 1894.*150 580  
60a 533  
c1a 177150 580  
173 585150 580  
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77a 29150 580  
88a 663150 580  
94a 840150 580  
96a 835

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108a 445150 580  
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104a 141

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118a 279

1. *NEGLIGENCE—wanton and willful negligence—ill-will immaterial.* If the servants of a railway company, at the time a plaintiff was injured, were running its engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, and where many persons were likely to be passing, such acts will be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount, in law, to wanton and willful negligence; and it will not be necessary, in order to raise such an inference, to prove that the defendant's servants were actuated by ill-will directed specifically to the plaintiff, or to have known that he was in such a position as to be likely to be injured.

2. *SAME—a question of fact for the jury.* An instruction, in an action by the plaintiff against a railroad company, which makes the mere fact that the plaintiff, at the time he was injured, was lying upon the defendant's track outside of the limits of the street, proof of negligence *per se*, so as to constitute, in law, a conclusive bar to his recovery, is clearly erroneous.

3. While the plaintiff's lying upon the railroad track would, unexplained, be very cogent evidence of negligence, the question would, after all, be a question of fact for the jury, since his being in that position may have resulted from various supposable causes not inconsistent with the exercise of reasonable care on his part.

4. *ORDINANCE CONSTRUED—speed of trains—"cars" includes locomotive engines.* An ordinance of a city providing that no railroad company shall run any passenger train or cars within the city limits at a greater rate of speed than ten miles an hour, nor any freight train or car at a greater rate of speed than six miles an hour, is broad enough to include any and all vehicles on wheels, and embraces locomotive engines, which are a species of "cars."

5. *WITNESSES—impeaching party's own witness.* While a party, after putting a witness upon the stand, is not at liberty to introduce evidence tending directly to impeach him, he may show that his evidence given for the other party is in fact untrue, although his so doing may constitute an indirect impeachment.

6. *PRACTICE—remarks of counsel to the jury.* On the trial of a case, a witness who had testified for the plaintiff was afterward put upon the

## Opinion of the Court.

he defendant, when he gave evidence damaging to the plaintiff, much of his testimony given for the defendant was disputed evidence. The plaintiff's counsel, in his closing address to the jury, said that the witness had committed perjury, and had been *Held*, no error in the court's refusal to direct the counsel to omit such remarks, and that counsel, in his argument, might draw proper and legitimate inferences arising from all the evidence in the case.

*INSTRUCTIONS—when refusal is not error—finding against the facts*

On the trial of an action against a railway company for an injury, the court refused to instruct the jury, "that although we believe, from the evidence, that defendant's servants were guilty of some or all the acts of negligence charged in the complaint, yet if they further believe, from the evidence, that plaintiff, at the time he was injured, was lying upon defendant's track outside of a street, he can not recover," etc. The jury specially found in favor of the plaintiff, when injured, was not lying upon the track of the defendant's road, and also that the place where he was injured was outside of the limits of the street: *Held*, that in view of such finding, the refusal of the instruction could not have injured the de-

fendant—*referring to the ad damnum*. Although the reference in the instruction to the amount in the *ad damnum* in the declaration is commendable, it will not constitute such error as to call for a reversal of the judgment, especially when the damages found are not excessive or exorbitant, and are made less than those sued for.

**OF ERROR** to the Appellate Court for the Fourth District, heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. A. S. WILDERMAN, Judge, pre-

SENTENCED CHARLES W. THOMAS, for the plaintiff in error.

ESSE M. FREELS, and Mr. VIRGIL RULE, for the defendant in error.

**JUSTICE BAILEY** delivered the opinion of the Court:

THIS WAS an action on the case, brought by James O'Hara against the East St. Louis Connecting Railway Company, to recover damages for a personal injury. The defendant owns and operates a double track connecting railway in the City

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Opinion of the Court.

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of East St. Louis, used for transferring cars to and from the numerous railways which have their termini there. This railway runs north and south, nearly parallel with the easterly bank of the Mississippi river, the wharves and landing of the Wiggins Ferry Company being between it and the river.

Front street in East St. Louis, runs north and south and along the east side of these wharves, and there is a conflict in the evidence as to whether the tracks of the railway in question are on or immediately west of that street. The plaintiff's contention is, that the tracks are on the westerly part of the street, while the defendant claims that the westerly track, the one upon which the plaintiff received his injury, is at no point upon the street. The evidence tends to show, however, that whether the westerly track is on the street or not, the tracks are not enclosed or separated from the street on the one hand, or the wharves of the Ferry Company on the other, but are so connected with the public street as to be apparently a part of it, and that the public have been in the habit, for many years, of crossing over the track at that place, in going from Front street to the landing of the Ferry Company.

The evidence tends to show that on the 23d day of October, 1889, in the evening, after dark, the plaintiff who was in the employ of the St. Louis Transfer Company as a teamster, after having put away his team in the barns of that company which were located east of Front street, started in a direct line across Front street and the tracks of the defendant to the ferry landing, and that as he was crossing the westerly track, he was struck by one of the defendant's engines backing up from the south, and was so injured as to require the amputation of his right arm. The plaintiff testifies that before going on the track he looked in both directions and saw no engine approaching and no light.

It is charged in the declaration, and the evidence tends to show, that at the time the plaintiff was injured, the engine was being run without a headlight, and with no bell ringing,



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Opinion of the Court.

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and that it was running at a dangerous and unlawful rate of speed. In the second or additional count it is alleged that these acts of negligence were wanton and willful, and that the engine was being run at a rate of speed prohibited by an ordinance of the city of East St. Louis. The defendant pleaded not guilty, and at the trial, the jury found the defendant guilty, and assessed the plaintiff's damages at \$5000. The court, at the instance of the defendant, also submitted to the jury several questions of fact to be found specially, and the jury thereupon found, (1) that the headlight on the locomotive which struck the plaintiff was not burning at the time of the accident; (2) that the bell of the locomotive was not ringing at the time of the accident; (3) that the plaintiff was not lying upon the defendant's track just before he was injured; (4) that the servants and agents of the defendant injured the plaintiff willfully and on purpose, and (5) that the place where the plaintiff was injured was in a public street.

The court, after denying the defendant's motion for a new trial, gave judgment in favor of the plaintiff for the amount of damages found by the jury and costs. On appeal to the Appellate Court that judgment was affirmed and the defendant now brings the record to this court, by writ of error, and assigns for error the judgment of the Appellate Court.

The facts being conclusively settled in favor of the plaintiff, the only errors submitted for our consideration, are those which call in question the rulings of the court in the instructions to the jury, in the admission of evidence and in failing or declining to restrain the plaintiff's counsel from indulging in certain remarks in his closing address to the jury.

Complaint is made of the first and only instruction given to the jury at the instance of the plaintiff. This instruction was as follows:

"The court instructs the jury, that if they believe and find, from the evidence, that the plaintiff, prior and at the time of receiving the injury complained of, was using due and ordi-

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Opinion of the Court.

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nary care for his personal safety and to avoid and prevent his injury, and without notice of approaching danger, that the defendant was then and there guilty of negligence as charged in the additional count of the declaration, and that the plaintiff, in consequence thereof, was, without his fault, then and there injured, as alleged in said additional count, then they will find for the plaintiff, and assess his damages at such sum as they believe, from the evidence, to be just compensation for the injuries so sustained, not, however, to exceed \$10,000,—the amount sued for.”

It is contended in the first place that it was error for the court by the instruction, to call the attention of the jury to the amount sued for, and instructing them that the damages awarded by their verdict in case they found for the plaintiff, should not exceed that sum. Although such reference to the amount of the *ad damnum* in the declaration is not to be commended, still, we do not think that it constituted such error as calls for a reversal of the judgment. That the amount of the *ad damnum* was the maximum beyond which the jury could not go is unquestionably a correct legal proposition, and we can not suppose that any jury of ordinary intelligence would regard such reference alone as any intimation by the court that the damages to be assessed should reach or approximate that sum. As the jury in fact assessed the plaintiff's damages at only \$5000, a sum which, in view of all the evidence, can not be regarded as unreasonable or exorbitant, we do not think the jury could have been misled or unduly influenced by the instruction.

In the next place it is insisted that the instruction ignored the defense, that the plaintiff at the time he was injured, was on the private right of way of the defendant, and proceeds upon the theory that the question of the precise place where the injury occurred, whether on the defendant's right of way or on the street, is a matter of no consequence. Whether the instruction is subject to this criticism or not, it

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Opinion of the Court.

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ient to say that the evidence as to whether the track he plaintiff was injured was in the street or not, was ng, and the jury at the instance of the defendant, pecially that it was in the street. That fact being tled adversely to the defendant, it is not important instruction ignored a defense based upon a hypothe- h the jury expressly found was not proved.

also contended that, as the instruction is based upon ge of negligence contained in the second or additional f the declaration, there was no evidence before the ding to support it. In that count the several acts of ace charged are alleged to have been committed wan- and willfully and it is claimed that there is no evidence to prove wanton or willful misconduct. If it be true, evidence tends to show, that the defendant's servants, ime the plaintiff was injured, were running their en- the dark, without a headlight, or a bell ringing, and gh and dangerous rate of speed, along a much fre- l street, and where many persons were likely to be ; on their way to the ferry landing or otherwise, such ould be liable to the construction of being in wanton llful disregard of the rights and safety of the public ly, so as to amount in law, to wanton and willful neg- . And it was not necessary, in order to raise an infer- such negligence, to prove that the defendant's servants ctuated by ill-will directed specifically towards the ff, or to have known that he was in such position as to ly to be injured.

or is assigned upon the refusal of the court to give the ng instruction asked on behalf of the defendant:

the court instructs the jury, that although they may be- from the evidence, that defendant's servants were, in uly of some or all the acts of negligence charged in laration, yet if they further believe, from the evidence, laintiff, at the time he was injured, was lying upon

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Opinion of the Court.

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defendant's track outside the limits of a street, he can not recover in this case."

This instruction makes the mere fact, (if it were a fact,) that the plaintiff at the time he was injured, was lying upon the defendant's track outside of the limits of the street, proof of negligence *per se*, so as to constitute in law a conclusive bar to his recovery. While his being found lying upon the track would, unexplained, be very cogent evidence of negligence, the question would, after all, be a question of fact for the jury; since his being found in that position may have resulted from various supposable causes not inconsistent with the exercise of reasonable care on his part. The instruction, as asked, therefore, was clearly erroneous.

But there is another reason why the refusal of this instruction can not be regarded as prejudicial to the defendant. The jury specially found that the plaintiff, at the time he was injured, was not lying upon the track of the defendant's road, and also that the place where he was injured was not outside of the limits of the street. The hypothesis of the instruction, then being one which the special findings of the jury have expressly negatived, no benefit could have resulted from giving such instruction, as it manifestly could have had no influence upon the verdict.

The next contention is that the court erred in permitting a section of an ordinance of East St. Louis to be read in evidence to the jury which provides, that, no railroad company shall run any passenger train or cars or permit the same to be run within the limits of the city at a greater rate of speed than ten miles an hour, nor any freight train or car at a greater rate of speed than six miles an hour, under the penalty of not less than \$25 nor more than \$100. The point made is that this ordinance has no application to locomotive engines when running alone, and forming no part of a train of cars. We are not disposed to adopt that construction of the ordinance. The purpose of the ordinance was to prevent

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Opinion of the Court.

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injury to persons and property from the running of trains and cars at too high a rate of speed within the city, and locomotive engines come clearly within the reason and purpose of the ordinance, as much when running alone as when attached to and propelling a train of cars. Besides the term "cars" in its proper signification includes many, if not all classes of vehicles on wheels, and we see no reason why, in its proper generic sense it may not be held to embrace locomotive engines as a species of cars. We, therefore, think there was no error in the admission of the ordinance in evidence.

The last point to be noticed relates to the ruling of the court in relation to the conduct of plaintiff's counsel, in his closing address to the jury. The bill of exceptions recites that in his closing address, "the counsel for the plaintiff said in substance that the witness Fries had committed perjury and had been bribed, and the defendant moved the court to direct said counsel to refrain from any such comments upon said Fries, but the court made no ruling on said motion, and the said counsel then proceeded and repeated such remarks to the jury, and to this action of the court, the defendant at the time excepted."

Fries had been called as a witness by the plaintiff and had testified in his behalf and was afterward put upon the stand by the defendant, when he gave evidence damaging to the plaintiff. Much of his testimony given for the defendant was disputed by other evidence, in the case. While the plaintiff, after putting him upon the stand as his own witness was not at liberty to introduce evidence tending directly to impeach him, he was at liberty to show that his evidence, given for the defendant was in fact untrue, although his so doing might constitute an indirect impeachment. And we see no reason why counsel in his argument was not at liberty to draw any proper and legitimate inferences arising from all the evidence in the case. We can not say, therefore, that the action of

## Syllabus.

the court in neglecting or declining to restrain remarks of counsel, was erroneous.

After giving the record careful consideration, we are able to find no material error, and the judgment of the Appellate Court will, therefore, be affirmed.

*Judgment affirmed.*

Mr. JUSTICE PHILLIPS, having heard this case in the Appellate Court, took no part in the decision of this case in this court.

SARAH J. BARROWS

v.

THE CITY OF SYCAMORE.

*Filed at Ottawa June 19, 1894.*

1. **STREETS**—*uses to which they may be appropriated.* The general rule long recognized by this court is, that, having the free and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the object for which they were established.

2. In the application of the rule it has been held that a city council may lawfully authorize the laying of railroad tracks upon, and water, sewage and gas pipes under, public streets, and that property owners could neither enjoin such use, nor recover damages to property occasioned thereby.

3. Laying pipes under the streets for the purpose of distributing water and gas and to carry off sewage, is lawful, both because it is necessary for the health, comfort and convenience of the inhabitants, and because it in no way interferes and is not incompatible with the use of such streets for public travel; yet it can not be contended that the water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use.

4. **SAME**—*liability of city for obstructing.* A city has no right to so obstruct public streets as to deprive the public and adjacent property holders of their use, as such. Their primary object is for ordinary passage and travel, and the public and individuals can not be rightfully deprived of such use.

150	588
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150	588
198	*505
198	*506
150	588
203	*225

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 Syllabus.
 

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**RE—erection of stand-pipe in street.** The erection of a stand-pipe works in a public street, near the buildings along the street, is an unlawful use of such street, and the manner of operating it, its structure, or its dimensions, affect only the question of damage to the owners.

**RE—who may complain of obstructions.** It is well settled that obstructions to streets, resulting in no special injury to an individual, but which a public alone can complain. There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law affords no relief, as, for instance, the building of a jail, police station, or the like, near private property.

An obstruction in a street does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, and it will lie. In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and that by reason of this disturbance he has sustained a special damage with respect of his property, in excess of that sustained by the public generally.

The absence of any statutory or constitutional provision on the subject, the common law affords redress in all such cases, and it is the intention of the framers of the present constitution to require legislation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. Where the action is by an individual, the special injury is the gist of the action, and if it is alleged and proved there can be no recovery.

**LEADING—action by lot owner against village for placing a stand-pipe in the street.** In an action by a lot holder against a village, for an obstruction to his property by the erection of a stand-pipe in the street, the counts of the declaration alleged that the plaintiff's property was depreciated in value because of the danger of the building being destroyed or damaged by the stand-pipe falling or being blown down, or by bursting and flooding with water, but no fact was alleged on which the apprehension of such damages could be based: *Held*, that the counts failed to show a cause of action.

Another count alleged that "said stand-pipe obstructs the light and air to the plaintiff's hotel building, and particularly to the parlor and dining-room in the south-west corner," etc.: *Held*, that this was a sufficient allegation of special injury to entitle the plaintiff to recover of damages. The extent of the injury is a question of fact, to be determined upon plea and trial.

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Opinion of the Court.

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APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of DeKalb county; the Hon. CHARLES KELLUM, Judge, presiding.

MESSRS. JONES & ROGERS, for the appellant.

MESSRS. CARNES & DUNTON, for the appellee.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the Court:

This is an action on the case, by appellant, against appellee, in the circuit court of DeKalb county, to recover damages for an alleged injury to real property. The circuit court sustained a demurrer to the declaration and rendered judgment against the plaintiff for costs, from which she appealed to the Appellate Court for the Second District, and from a judgment of affirmance in that court she prosecutes this appeal.

The cause of action set up in the declaration is, that plaintiff is the owner of a certain lot in the city of Sycamore, with a two-story building on the south-west corner thereof, fronting south and west, on State and Main streets, which she used and occupied as a residence and hotel; that the city "injuriously, unjustly and wrongfully constructed, or caused to be constructed and erected, at or near the center of the intersection of said streets, and at a distance of about fifty-six and one-half feet from said hotel building, a stand-pipe or water tower" fifteen feet in diameter and about one hundred and thirty-five feet high, having a capacity of 179,000 gallons, made of steel or iron plates five feet wide, riveted together, the lower course being nine-sixteenths of an inch thick, and those above diminishing to the upper course, which was three-sixteenths of an inch. This structure is alleged to have caused an injury to plaintiff's building, which is set forth in each of the four counts of the declaration, as follows:

First count: "Which stand-pipe, by reason of the fact that there is a constant apprehension that it may fall over upon said hotel building, and by its great weight injure, crush or



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Opinion of the Court.

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the same, or that it might blow over upon said property and flood the same, greatly depreciates in value for resident, hotel and business purposes, and greatly depreciates in price the market value of same."

Third count: "Which stand-pipe is liable to fall or blow over upon said premises, and by its great weight injure, crush or destroy said hotel building, and is liable to burst and flood said premises, and thus injure the same or destroy the said building, and thereby greatly depreciates in value said premises," etc.

Fourth count: "Which stand-pipe is of a dangerous character, is liable to fall or blow over upon said hotel building, and by its great weight injure, crush or destroy the same, and is liable to burst and flood said premises, and thus injure the same or destroy the said hotel building, and the stand-pipe a constant menace to plaintiff's property, and the liability of said structure, and structures of like character, to blow over or burst, has thereby greatly depreciated in value said premises for resident, hotel or other business purposes, and especially greatly depreciates in price the market value of said premises."

Fifth count: "And by reason of defendant constructing, or about to be constructed, said stand-pipe, as above stated, in the public streets of said city, and so near to plaintiff's building, said stand-pipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and bedroom in the south-west corner of said hotel building, obstructs the view from said hotel building; and said stand-pipe being of so great height, and in front of and near plaintiff's said premises, casts a shadow upon said hotel building, and makes the appearance of said premises unattractive, and otherwise injuriously affects said premises, and plaintiff's said premises are less convenient and comfortable for resident and hotel purposes; and by reason of the

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Opinion of the Court.

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wrongful acts and doings of the defendant, as aforesaid, and the injuries done to plaintiff's property, as aforesaid, the market value of plaintiff's said premises is thereby greatly decreased."

Each of these counts concludes with the averment, "that by means of the premises the said defendant has greatly injured and damaged the said property of plaintiff, within the meaning of the constitution and laws of the State of Illinois, yet the said defendant has never paid, nor offered to pay, to the said plaintiff any of the damage so injuriously and unjustly caused to the plaintiff's said property, nor has any proceeding been instituted by the defendant for the purpose of having just compensation therefor ascertained; and the plaintiff avers, that by reason of the premises above set forth the plaintiff's said property has been greatly damaged and depreciated in value, to the damage of said plaintiff of the sum of three thousand (\$3000), and therefore she brings her suit," etc.

It thus appears that the declaration proceeds both upon the ground that placing the stand-pipe in the street was wrongful, and, even if authorized by law, plaintiff's property could not, under the constitution, be damaged thereby without just compensation, which had not been ascertained. The demurrer was, in effect, general to each count, viz., it made no objection to the declaration on account of duplicity, or the mere form of pleading, and therefore the only question presented for our decision is, does either of the counts state, in substance, a good cause of action.

It is insisted on behalf of the city, that being the owner of the fee in the streets, and having the absolute control over them, it had a right to build the stand-pipe in them, and that if injury resulted thereby to plaintiff's property it is *damnum absque injuria*. The soundness of this position depends upon whether the placing of a structure, like that described in the declaration, in the streets of a city, is consistent with the objects for which streets are established and held by municipal authorities in trust for the public use. The general rule long

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Opinion of the Court.

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ed by this court is, that, having the fee and ex-  
rol over streets, municipal authorities may appro-  
em to any use not incompatible with the object for  
ey were established. (*City of Quincy v. Bull et al.*  
337, and cases there cited). In the application of  
it has been held in the case cited, and others, that a  
ncil may lawfully authorize the laying of railroad  
pon, and water, sewer and gas pipes under, public  
nd that property owners could neither enjoin such  
recover damages to property occasioned thereby.  
pipes under the streets for the purpose of distributing  
d gas and carrying off sewage, is lawful, both because  
ssary for the health, comfort and convenience of the  
nts, and because it in no way interferes with and is  
npatible with the use of such streets for public travel.  
tracks may be lawfully laid in streets, for the reason,  
l in the *Moses case*, cited in *Quincy v. Bull, supra*, "a  
made for the passage of persons and property, and  
can not define what exclusive means of transportation  
sage shall be used." It was, however, held in *Stack*  
*f St. Louis*, 85 Ill. 377, and cases cited to the same  
*Legare v. City of Chicago*, 139 Ill. 46, that in permit-  
use of streets for other purposes than public thor-  
s, "the city has no right to so obstruct them as to  
the public and adjacent property holders of their use  
ts. The primary object is for ordinary passage and  
nd the public and individuals can not be rightfully  
of such use."

s not follow, therefore, that because railroad tracks  
put on or pipes under the streets, structures like the  
ribed in this declaration can be built in them. Water  
pipes, with hydrants, lamp-posts and other appli-  
re necessary for the distribution of water and light  
city, and the streets may be legitimately used for  
pose; but it would scarcely be contended that the  
-150 ILL.

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Opinion of the Court.

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water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use. In fact, directly the contrary was held in *City of Morrison v. Hinkson*, 87 Ill. 587, as to water works. It was there said: "But it is not conceded that the erection of a water tank in the center of the street, occupying one-half of the width thereof, and the erection and operating of a steam engine in connection therewith, even for the purposes of supplying the city and the residents thereof with water, is one of the uses of a street, as such, for which the ground may be appropriately used under a dedication thereof as a street. The owner of a lot adjoining a street does not take the same subject to any such easement." It is true, it was stated in that case that the proof did not show in whom the fee of the street was vested; but if the same could not be said here, there being no allegation in the declaration as to that fact, still, as shown by *Stack v. East St. Louis*, *supra*, and cases there referred to, the fact that the title is in the city gives it no right to pervert its use as a street. The fee simple title, though in the city, is held in trust for the public use, as a street. Nor do we regard the fact that the tank in *City of Morrison v. Hinkson* occupied more of the street, and was filled by machinery immediately attached, also in the street, distinguishes that case in principle from this. A stand-pipe is but a part of the machinery and appliances with which water is forced into the pipes throughout the city. There is no necessity for placing it in a public street, and, so far as appears in this case, neither the health, comfort nor convenience of the public or individual citizens is promoted by so doing. Therefore, placing it there was an unlawful use of the street, and the dimensions of the structure, and the manner of operating it, in the decision of this case, affect only the question of damages, to be hereafter considered.

Our opinion then is, that the allegations of the declaration admitted by the demurrer show that the city wrongfully placed

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Opinion of the Court.

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the structure in its streets. It does not, however, follow, that a good cause of action in the plaintiff is shown by her declaration. It is well settled, that for obstructions to streets, resulting in no special injury to an individual, the public alone can complain. (*McDonald v. English*, 85 Ill. 232; *City of Morrison v. Hinkson*, *supra*.) The individual right, under our present constitution, is thus stated in *Rigney v. City of Chicago*, 102 Ill. 80: "While it is clear that the present constitution intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So, as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. When the action is by an individual, the special injury is the

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Opinion of the Court.

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gist of the action, and unless it is alleged and proved there can be no recovery." *McDonald v. English, supra*.

Under this rule it is too clear for argument that neither of the first three counts of the declaration shows a right of action in the plaintiff. The special injury attempted to be set up in each of these counts is, that her property has been depreciated in value because of the danger of the building being destroyed or damaged by the stand-pipe falling or being blown upon it, or by bursting and flooding it with water, but not a single fact is alleged upon which the apprehension of such danger can be based. In the first count nothing but the apprehension itself is alleged, and in the second and third, merely that it (the stand-pipe) is *liable* to fall, blow over or burst. Why the apprehension exists, or why it is liable to fall, etc., is left wholly to conjecture. It certainly will not be contended that the manner in which it is constructed, as shown by the declaration, necessarily renders it dangerous. No one will deny that such a structure could be rendered reasonably secure by proper stays and braces, though it might not be so without. True, as in the instances referred to by counsel for appellee, water towers and stand-pipes have fallen or been destroyed; but the same is true of buildings of every kind,—perhaps of all superstructures. If this one is liable to fall, blow down or burst, that liability must arise from certain facts, and those facts must be pleaded. Here we have nothing but the mere conclusion of the pleader.

The fourth count avers that "said stand-pipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting-room in the south-west corner," etc. We are unable to see why this is not a sufficient allegation of special injury to plaintiff's property to entitle her to recover. (*Rigney v. City of Chicago, supra*.) The extent of the injury is a question of fact, to be determined upon plea and trial.

We think the circuit court erred in sustaining the demurrer to the fourth count.

*Judgment reversed.*

THE CHICAGO AND ALTON RAILROAD COMPANY

v.

THE CITY OF CHICAGO.

*Filed at Ottawa June 19, 1894.*

questions raised in this case have been fully considered in cases previously decided in this court.

from the Superior Court of Cook county; the Hon. F. BLANKE, Judge, presiding.

J. SCRAFFORD, and Mr. WILLIAM BROWN, for the ap-

ARRY RUBENS, Mr. LOCKWOOD HONORE, and Mr. M. W. v, for the appellee.

URIAM: This was a proceeding in the court below, by of Chicago, to condemn the right of way across appel-ack and right of way, for a street. All the questions in this record have been fully considered and frequently in other cases to be found in the later volumes of our

On the authority of the following cases the judg-the Superior Court will be affirmed: *Illinois Central Co. v. Willenborg et al.* 117 Ill. 203; *Peoria and Pekin Railway Co. et al. v. Peoria, etc. Railway Co.* 105 id. *Chicago and Alton Railroad Co. v. Joliet, etc. Railroad Co.* Snell et al. v. Chicago et al. 133 id. 413; *Chicago and stern Railway Co. v. Chicago*, 140 id. 309; *Illinois Cen-broad Co. v. Chicago*, 141 id. 586; *Lake Shore and n Southern Railway Co. v. Chicago*, 148 id. 509.

*Judgment affirmed.*

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Syllabus.

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HENRY H. GAGE

v.

JOHN J. McDERMID.

*Filed at Ottawa June 19, 1894.*

1. *COLLATERALS—right of debtor to their return, on payment.* Where a debtor gives his note, secured by deed of trust, for a debt, as collateral security, and afterward, and as a further security, assigns to the creditor a mortgage given to him on the same premises, covenanting therein that he has the right to make such assignment, such debtor will only be bound to pay the indebtedness for which the collaterals were given, and upon such payment he will be entitled to a surrender of both collaterals.

2. *MORTGAGE—assignment after payment—whether a revival of the mortgage.* Where a mortgagor conveys the mortgaged premises to the mortgagee in payment of the debt, the lien of the mortgage will thereby be extinguished, or at least merged in the fee, and an assignment of the note and mortgage by the mortgagee, even for a valuable consideration, will not so far revive and give renewed vitality to the lien as to enable the assignee to enforce it by foreclosure.

3. *SAME—assignment without consideration.* M., being indebted to W. in the sum of \$5100, gave his note to W. in the sum of \$6000, secured by a deed of trust on certain lots, as collateral security, when it was discovered that a mortgage given to M. on the lots was not satisfied of record, though, in fact, it had been paid by a conveyance of the lots to M. by the mortgagor. Instead of satisfying the mortgage of record, and for the purpose of perfecting the title to the property, M. made an assignment of such mortgage to W., without any change in the original agreement: *Held*, that the assignment, being without any new consideration, was a mere gratuity.

4. But where the assignor, in such case, made a covenant in the assignment as to the sum due under the mortgage, and of his right to make the same, it was *held*, the utmost that could be claimed was, that the assignee acquired, by the assignment, a right to hold the mortgage, as against the assignor, as a further security for the same indebtedness which the deed of trust was given to secure, and that on its satisfaction by foreclosure sale and redemption, the assignor was entitled to a return of the note and mortgage so assigned, and that the assignee, or one succeeding to his rights, with notice of the facts, had no right to foreclose such mortgage as against the assignor.

5. One W. gave his note of \$5300 to M., secured by a mortgage containing a power of sale. W., becoming insolvent, conveyed the mort-



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Opinion of the Court.

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promises to M. in payment of the debt, but the latter neglected to pay the note and mortgage. Twelve years thereafter, being indebted to a bank in the sum of \$5100, M. gave to the president of the bank a note of \$8000, secured by a deed of trust as collateral security, and of entering satisfaction of the old mortgage, assigned the mortgage to the president of the bank, covenanting in the assignment that he would pay the mortgage not less than \$5300, and that he had no right to assign the same, there being no consideration for such assignment, and delivered the same, as further collateral security for the debt to the bank. The bank sold the \$6000 note and delivered the proceeds to G., who foreclosed the deed of trust, and the brother of G. became the purchaser of the property for the amount due on the mortgage and costs, from which sale M. redeemed. G. thereupon sold the mortgage of W. to M. by a sale of the property, and the proceeds of G. became the purchaser, having knowledge of the facts: that the brother of G. was not a *bona fide* purchaser as against M., that the sale under the mortgage was wrongfully made, and that the sale made on the second sale should be set aside as a cloud on

AL from the Superior Court of Cook county; the Hon. STEIN, Judge, presiding.

ALLAN C. STORY, for the appellant.

H. S. McCARTNEY, for the appellee.

JUSTICE BAILEY delivered the opinion of the Court:

There was a bill in chancery, brought by John J. McDermid against Henry H. Gage, to set aside a sale of certain real estate under a power in a mortgage. The facts disclosed by the record are in substance as follows:

On the 4th day of October, 1876, Justin C. Waterman executed to the complainant his promissory note for \$5300, payable one year after date, with ten per cent interest, and secured the payment thereof, executed and delivered to the complainant a mortgage, with power of sale, on lots numbered 21 to 26, in block 2, in E. E. Hundley's subdivision, in Cook county. Afterward, and before the maturity of the note, Waterman, having failed in business and having become insolvent, for the purpose of paying and satisfying the

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Opinion of the Court.

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note and mortgage, executed to the complainant a quit-claim deed, bearing date March 20, 1877, conveying or intending to convey to him the property covered by the mortgage. There being some error in the description of the property in this deed, Waterman subsequently executed to the complainant another quit-claim deed for the purpose of correcting such error, that deed also bearing date March 20, 1877, but acknowledged June 28, 1883. These deeds were both duly recorded. At the date of the execution of the first of these deeds, Waterman was, and ever since that time has been a non-resident of this State. The deeds were transmitted by him to the complainant by mail, and the complainant, as it appears, though regarding the note as paid and satisfied, neglected to forward or surrender it to Waterman, but kept it in his own possession.

On or about April 23, 1889, which was a little more than twelve years after the payment of the note in the manner above stated, the complainant, being indebted to the Chicago National Bank, or to John R. Walsh, its president, in the sum of \$5100, executed to the bank or to Walsh his promissory note for that sum, due one year after date, and arranged to execute and deliver, as collateral security thereto, his promissory note for \$6000, and a trust deed to Charles H. Wood, as trustee, conveying the property above described. It seems that by the agreement, the complainant was to make a good title to the property, except as against certain tax deeds thereon held by Henry H. Gage. On causing the title of the property to be examined, Walsh discovered that, in addition to the tax deeds, the mortgage above described appeared to be still an outstanding incumbrance upon it. The complainant, on his attention being called to these facts, stated that he had the note and mortgage in his possession, but that they were paid and satisfied in full. At Walsh's request he produced them, and Walsh, as a part of the transaction, instead of having the note and mortgage cancelled and satisfied of

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Opinion of the Court.

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record, caused an assignment of the mortgage from the complainant to himself to be drawn up in the usual form, said paper also containing the following recital and covenant in relation to the note and mortgage: "And I do, for myself and my heirs, executors and administrators, covenant with the said party of the second part, his heirs, executors, administrators and assigns, that there is now actually due and owing on said promissory note and mortgage, in principal and interest, \$5300, and I have good right to assign the same." This assignment was executed by the complainant under his hand and seal and duly acknowledged, and it, with the mortgage and note, were delivered to Walsh, at the same time and as a part of the same transaction in which the deed of trust and the \$6000 note thereby secured were delivered. The evidence shows beyond question that no additional consideration was given by Walsh for the assignment of the note and mortgage, and that the only purpose for which the assignment was required was, to furnish further assurance of the complainant's title to the premises to be conveyed by the proposed deed of trust.

The indebtedness to which the \$6000 note and deed of trust were deposited as collateral having matured and not being paid, a broker in the employ of Walsh sought to sell Walsh's collaterals to Henry H. Gage, the owner of the tax titles, but was referred by him to his brother, Augustus N. Gage, as one who might make the purchase. Negotiations were thereupon entered into with Augustus N. Gage which, on the 28th day of November, 1890, resulted in a sale to Gage of these collaterals, the amount paid by Gage therefor being the exact amount, principal and interest, then due on the \$6000 note. That note and deed of trust were then assigned and delivered to Augustus N. Gage, and at the same time the Waterman note and mortgage were delivered to him.

The evidence tends to show, and the court below found, that in purchasing these securities, Augustus N. Gage merely rep-

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Opinion of the Court.

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resented his brother Henry H. Gage as his attorney; that Henry H. Gage furnished the money with which the purchase was made, and that, in the transaction, no consideration whatever was paid for the Waterman note and mortgage, and also that Henry H. Gage had actual notice of the conditions and terms upon which Walsh received and held the note and mortgage. It is true that, as to the facts thus found, there is considerable conflict in the evidence, it being insisted on the part of the Gages that Augustus N. Gage bought the securities for himself and with his own money; that the transaction was in fact a sale and assignment to him by Walsh of both the deed of trust and mortgage, and that neither he nor Henry H. Gage had any knowledge or notice, other than that appearing upon the face of the papers, of any of the circumstances relied upon by the complainant as affecting the validity of the mortgage, as a valid and subsisting security for the amount of money appearing to be due thereon.

As to the questions of fact thus presented, all we need say is, that the witnesses were examined in open court, and the chancellor therefore had an opportunity to see them and hear them testify, and was in a better position to judge of their relative credibility than we can be. But independently of that consideration, we have examined the record with care, and have reached the conclusion that the evidence sustains the findings of the decree in these respects.

On the 19th day of July, 1891, Augustus N. Gage filed his bill in chancery against the complainant and others, for a foreclosure of the deed of trust, and such proceedings were had, that on October 3, 1892, a decree of foreclosure and sale was rendered, under which the mortgaged premises were sold for the full amount of the decree, interest and costs, Henry H. Gage being the purchaser. From that sale, the complainant, on January 3, 1893, redeemed the premises, the amount of the redemption money paid by him being \$7874.89. While the foreclosure suit was pending, Augustus N. Gage, without

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Opinion of the Court.

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actual notice to the complainant and without his knowledge, claiming to act under the power of sale in the Waterman mortgage, advertised the premises for sale, and on the 24th day of September, 1892, sold them under that mortgage to Henry H. Gage, and executed a mortgagee's deed purporting to convey the premises to him.

The court below by its decree found and held, in substance, that by the foreclosure sale under the deed of trust and the redemption by the complainant therefrom, the complainant became entitled to the return of the Waterman note and mortgage, and that Henry H. Gage took whatever interest was conveyed to him by the mortgage sale with notice of the complainant's rights in the premises. The court further found that the mortgagee's deed was a cloud upon the complainant's title which should be set aside and held for naught. It was accordingly decreed that the complainant, at the time of filing the present bill, was the owner of the premises in question in fee; that Henry H. Gage had no title or interest therein derived from the mortgagee's deed; that the sale under the mortgage be set aside and held for naught as against the complainant, his heirs and assigns, and that Henry H. Gage, and all persons claiming under him, be perpetually enjoined from asserting any title to or interest in the premises under the mortgagee's deed. From that decree, Henry H. Gage has appealed to this court.

Were it not for the complainant's covenant in his assignment of the Waterman note and mortgage to Walsh that there was \$5300 then actually due on the note and mortgage, and that he had good right to assign the same, the case would be entirely without difficulty. At the date of the assignment, the note was many years past maturity, and the evidence is clear and uncontradicted that it had long before that time been paid and satisfied in full by the conveyance to the complainant of the property covered by the mortgage. The lien of the mortgage had thereby been extinguished, or at least

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Opinion of the Court.

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merged in the fee, and it is difficult to see how a mere assignment of the note and mortgage, even for a valuable consideration, could so far revive and give renewed vitality to the lien as to enable the assignee, or those claiming under him, to enforce it by foreclosure.

The evidence also shows beyond controversy that it was not within the contemplation of either the complainant or Walsh, at the time the assignment was made, to attempt to revive the note and mortgage with a view of having the same enforced as a lien upon the land. Both understood perfectly that the mortgage lien was extinguished or merged in the fee. But it having been discovered, upon examination of the title, that the mortgage had not been discharged of record, the assignment of the mortgage was adopted as the mode of curing the apparent defect in the title, and not with the view of vesting in Walsh an additional lien upon the land.

Nor was any additional consideration given by Walsh for the execution of the assignment. The \$6000 note and deed of trust had been arranged for before Walsh had any knowledge of the existence of the Waterman mortgage, and by that deed, the indebtedness to which it was to be given as collateral would be fully and amply secured, provided the title to the property to be covered by the proposed deed of trust was found free from incumbrance. The examination of the title having brought to light the existence of the mortgage, no change was made in the arrangement already agreed upon, or in the consideration proceeding from Walsh. The assignment of the mortgage, except so far as it was intended as a mode of perfecting the title to the property, would therefore seem to be in fact a mere gratuity from the complainant to Walsh.

The defendant however insists that the complainant is estopped by his covenant to assert that, at the time the assignment of the mortgage to Walsh was executed, the Waterman note was paid and the lien of the mortgage extinguished, and that his admission thereby made that \$5300

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Opinion of the Court.

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was then due on the note and mortgage must be held to be conclusive against him. If that be admitted, and we see no reason why it should not be, the utmost that can be claimed is, that Walsh acquired by the assignment, a right to hold the mortgage as a further collateral for the same indebtedness for which the deed of trust was deposited as security. But even upon that theory, the complainant only became bound to pay the principal indebtedness for which these collaterals were given, and upon making such payment, he would become entitled, at least as against Walsh, to the surrender of both collaterals.

Some attempt was made at the hearing to show that, at the time of these transactions, a much larger sum than \$5100 was owing from the complainant to the Chicago National Bank or to Walsh, and that these securities were in fact deposited as collateral to such larger indebtedness, but the testimony of both the complainant and Walsh clearly establishes the contrary, and the same conclusion is fortified by the fact shown by the evidence, that after the sale by Walsh of the \$6000 deed of trust for the full amount of principal and interest due thereon, Walsh accounted for and paid over to the complainant the difference between the sum thus realized and the amount appearing to be due upon the \$5100 principal indebtedness.

Assuming, as we do, the correctness of the finding of the court that the transaction between Walsh and Augustus N. Gage was a sale and purchase of the \$6000 note and deed of trust, Gage paying therefor the amount appearing to be then due thereon, and that the Waterman note and mortgage were transferred to Gage without consideration, and as a mere incident to the debt secured by the deed of trust, it follows that, as between Gage and the complainant, the principal indebtedness was that evidenced by the \$6000 note, and that Gage, at most, was entitled to the Waterman note and mortgage only as collateral to such principal indebtedness. Especially

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Opinion of the Court.

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must this be held to be the case in view of the evidence tending to show that Gage took these securities charged with notice of the way in which Walsh obtained and held them.

Such being Gage's rights, there can be no doubt that the satisfaction of the \$6000 note by the foreclosure sale and redemption, entitled the complainant to a return and surrender of the Waterman note and mortgage. As has already been stated, after the commencement of the foreclosure suit and while it was pending, Augustus N. Gage went through the forms of foreclosing the Waterman mortgage by advertising and selling the premises under the power of sale, Henry H. Gage being the purchaser. After such sale, however, the foreclosure of the deed of trust was prosecuted and a final decree obtained for the full amount of the \$6000 note, with interest and costs, no credit being given for the amount realized from the sale under the mortgage, and the premises were again sold for the full amount of the decree, Henry H. Gage also being the purchaser at that sale. Henry H. Gage, as the evidence shows, was the real owner of the securities before foreclosure, and being charged with notice of the complainant's rights, his becoming the purchaser at these sales does not entitle him, as against the complainant, to the position of a *bona fide* purchaser for value. By the sale under the foreclosure decree and the redemption therefrom, the \$6000 note, which, as between the present parties, constituted the principal indebtedness, was paid and satisfied in full, and the complainant thereby became entitled, as against Henry H. Gage and his attorney, to the surrender of such title as was acquired by him under the mortgage sale. The decree, by perpetually enjoining Gage and all persons claiming under him from asserting any title to or interest in the mortgaged premises under the mortgagee's deed, has practically accomplished that result. The decree, in our opinion, is warranted by the evidence, and it will be affirmed.

*Decree affirmed.*



## Syllabus.

## THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY

v.

PATRICK WALSH.

*Filed at Ottawa June 19, 1894.*

1. APPELLATE COURT—*duty to pass upon the assignment of errors.* Where the bill of exceptions is properly certified that it contains all the evidence, it is the duty of the Appellate Court to consider and determine the errors assigned, and it will be error to refuse to pass upon them.

2. BILL OF EXCEPTIONS—*when amendable.* Upon the filing of a bill of exceptions it becomes a part of the record in the cause, and if, for any reason, it fails to fully and correctly show what actually transpired at the trial, it, like other portions of the record, is amendable.

3. After the term has expired at which the record is made, or the time limited for settling the bill of exceptions has passed, the amendment can be made only by bringing the parties in interest again into court, by the service of proper notice, and then only when there is some memorandum, minute or note of the judge, or something appearing on the records or files of the court, to show the facts in respect of which the amendment is sought to be made.

4. Where the trial court makes an amendment of a bill of exceptions, in the absence of any exception to the source of information upon which the court acted it will be presumed there was something to amend by,—some note or memorandum of the evidence sufficient to enable the court to make the proper amendment; and it is incumbent upon the party objecting to the amendment, to show, by bill of exceptions, upon what the court acted, if he intends to question its sufficiency to authorize the amendment to be made.

5. The judge, in an order allowing an amendment of a bill of exceptions, certified that on the motion to amend he examined the record in the case, including the stenographer's transcript of the evidence theretofore filed and made a part of the record, and the various papers and exhibits introduced in evidence; that he kept some minutes of the evidence heard at the trial, but not sufficiently full to authorize the making of the certificate from said minutes alone, but that on the motion for new trial the original bill of exceptions, which contained the stenographer's transcript of the evidence, was examined by him; and the judge then certified that from his personal knowledge and recollection it was true that the bill of exceptions contained all the evidence in the case: *Held*, that such certificate was sufficient to authorize the amendment of the bill of exceptions.

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Opinion of the Court.

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6. *SAME—amending from stenographer's notes.* It is true that the amendment could not be made from the personal knowledge or recollection of the judge. The judgments and records of courts can not be permitted to rest upon so uncertain a foundation. But if the judge acts upon sufficient matters shown by the record, independent of his personal recollection, and allows an amendment, there will be no error. The court may also refer to the report of the evidence made by a stenographer, though not bound to take it as true.

7. And when the trial judge has in apt time approved the transcript made by an official stenographer, as being a correct transcription of the evidence, there can be no objection to his referring to the same as accurate data upon which to predicate his future order in the cause.

8. *SAME—amending—preserving a record of proceedings therein.* Where the court allows an amendment of a bill of exceptions, if either party requires it, a bill of exceptions will be allowed showing the facts upon which the action of the court is based. But when the court recites in its order the facts upon which the amendment is predicated, and which is duly signed and sealed by the judge, it performs the office of a bill of exceptions, and there is no objection to the practice of thus preserving in the record such facts.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

Mr. EDWIN WALKER, for the appellant.

Messrs. WALKER, JUDD & HAWLEY, for the appellee.

Mr. JUSTICE SHORE delivered the opinion of the Court:

This was an action by appellee, against appellant, to recover damages for personal injury. Trial by jury resulted in a verdict of \$29,583.33 $\frac{1}{2}$ , for which plaintiff had judgment. On appeal to the Appellate Court that court found, and entered as a part of its final order, its finding "that the record in this case does not contain any certificate that the bill of exceptions contains all the evidence introduced on the trial of the cause in the court below, and therefore this court is bound to presume there was sufficient evidence to sustain the judgment, and therefore declines to consider any and all of the

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Opinion of the Court.

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errors assigned." The judgment was accordingly affirmed, and an appeal prayed and allowed to this court.

The only question we shall consider upon this record is that raised by the assignment of error that the Appellate Court erred in refusing to consider the errors of law and fact assigned in that court. If the bill of exceptions was properly certified, it was admittedly the duty of the Appellate Court to consider and determine the errors assigned.

The bill of exceptions, as originally incorporated into the record, was defective, in that there was no certificate that it contained all of the evidence introduced at the trial. In the Appellate Court there was a suggestion of diminution of the record, and leave asked and granted to file an additional record. The additional record filed was an additional transcript of the record of the circuit court of Cook county, certified by the judge before whom the trial was had, at a term of the court subsequent to that at which the judgment was rendered. It appears that the original bill of exceptions was signed and filed September 25, 1893, and an order was entered in the cause by the court, October 30, 1893, *nunc pro tunc*, as of September 25, 1893, as follows:

"On motion of attorneys for defendant, after notice duly given to the plaintiff, and all parties being in court, and after a careful examination of the record in this case by the Honorable R. W. Clifford, judge thereof, and of the stenographer's transcript of the evidence heretofore filed herein and made a part of the records in said cause, and of the various papers and exhibits introduced in evidence in said case and made a part of the record in said cause by being embodied in said bill of exceptions heretofore signed and sealed, to-wit, on the 25th day of September, A. D. 1893, and the court being fully advised in the premises, said judge hereby certifies that he kept some minutes of the evidence in said case upon the trial thereof, but not sufficiently full to authorize the certificate from said minutes, alone, that said bill of exceptions con-

## Opinion of the Court.

tained all the evidence offered or introduced in the case, but further certifies that on the motion for a new trial said bill of exceptions hereinbefore referred to was presented and examined by said judge, and that from his personal knowledge and recollection it is true that said bill of exceptions contained all the evidence offered or introduced on the trial; and therefore, upon motion of defendant's counsel, it is ordered that the certificate of said judge to said bill of exceptions be so amended as to certify the facts, by inserting the following, to-wit: 'The foregoing bill of exceptions contains all the testimony and evidence introduced in the case by either and both of said parties, and that this order be entered of record in said cause *nunc pro tunc*, as of the 25th day of September, A. D. 1893,'—to the entry of which said order, and the action of the court relative thereto, the plaintiff, by his counsel, then and there excepted.

(Seal.)

RICHARD W. CLIFFORD,  
*Judge of Circuit Court of Cook Co."*

Upon filing the original bill of exceptions it became a part of the record in the cause, and if, for any reason, it failed to fully and correctly show what actually transpired at the trial, was, like other portions of the record, amendable. After the term has expired at which the record is made or the time limited for settling the bill of exceptions has passed, the amendment could be made only by bringing the parties in interest again into court by the service of proper notice, and then only where there was some memorandum, minute or note of the judge, or something appearing on the records or files of the court to show the facts in respect of which the amendment is sought to be made. *Coughran v. Gutcheus*, 18 Ill. 390; *Wallahan v. The People*, 40 id. 102; *Goodrich v. Minonk*, 62 id. 121; *Heinsen v. Lamb*, 117 id. 549; *The People v. Anthony*, 129 id. 218.

That proper notice was given of the intended application for amendment of the record, and that the parties in interest

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Opinion of the Court.

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were actually present before the court upon such application, is not questioned. It is, however, insisted, that the court was not authorized to make and enter the order amending the record, for the reason that it is not shown that it was made from any memoranda or minute kept by the judge, or that anything appeared in the record and files from which the amendment could be made.

It is first objected that there was no separate bill of exceptions taken, showing upon what the court acted in making the amendment. Undoubtedly, if either party had seen proper to request it, such a bill of exceptions should have been allowed. But where the court recites in its order the facts upon which the amendment is predicated, and which is duly signed and sealed by the judge, as was here done, it performs the office of a bill of exceptions, and no objection is perceived to the practice of thus preserving in the record such facts,—and this must necessarily be so where no bill of exceptions is asked, and the parties, being present in court, fail to object. Moreover, if the recitals in the order are rejected as no part of the record, it can not avail appellee. In *Wallahan v. The People, supra*, which has been approved in many subsequent cases, it was held, that where the court below has made an amendment, in the absence of any exception to the source of information upon which the court acted, it must be presumed there was something to amend by,—some note or memorandum of the evidence sufficient to enable the court to make the proper amendment; and it was incumbent upon the party objecting to the amendment, to show, by bill of exceptions, upon what the court acted, if he intended to question its sufficiency to authorize the amendment to be made.

Treating, therefore, the recitals of fact in the order as the basis upon which the court acted, is there sufficient shown to authorize the amendment,—that the bill of exceptions, made part of the record, contained all the evidence introduced at the trial? The judge certifies that, upon the motion of ap-

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Opinion of the Court.

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pellant to amend the record, he examined the record in the case, including the stenographer's transcript of the evidence theretofore filed and made part of the record, and the various papers and exhibits introduced in evidence in the case; that he kept some minutes of the evidence heard at the trial, but not sufficiently full to authorize the making of the certificate from said minutes alone, but that on the motion for new trial the original bill of exceptions, which contains the stenographer's transcript of the evidence, was examined by him, etc. The judge then certifies that, from his personal knowledge and recollection, it is true that said bill of exceptions contained all the evidence offered on the trial.

It is unquestionably true that the amendment could not be made from the personal knowledge or recollection of the judge. Judgments and records of courts can not be permitted to rest upon so uncertain a foundation. But it is evident that the amendment was made, not alone from the recollection and personal knowledge of the judge, but from the *data* remaining on file, to which he certifies he referred; and the fact that he adds, in his recitals, the further sanction of his personal knowledge and recollection, will not vitiate the amendment, if authorized by the facts appearing upon the record and files or in the minutes or memoranda kept. The judge had, on the motion for new trial, examined a transcript of the evidence taken by the stenographer at the trial, and had subsequently incorporated it into the bill of exceptions and made it part of the record. That transcript of the evidence was before him and is before us.

Formerly, the judge was necessarily dependent upon his notes and memoranda, and the record and files in the cause, for *data* upon which to predicate an amendment. The keeping of minutes by the trial judge, which were always necessarily meagre, has very largely fallen into disuse, for the reason that the more accurate, and, indeed, reliable, mode has been adopted of keeping full stenographic notes of what

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Opinion of the Court.

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occurred at the trial, and the practice has become practically uniform, both with the courts and the bar, to rely upon the stenographic report as the most reliable *data* attainable, in all subsequent proceedings in the cause. The stenographer is dependent upon the judge for his appointment and tenure of office. He is a sworn officer of the law, charged with keeping full and accurate stenographic notes of the evidence in all trials in the court for which he is appointed, and with making true and correct transcripts thereof. (3 Starr & Curtis, secs. 1, 2, p. 324.) The notes thus taken, and the transcript thereof, are necessarily not conclusive upon the trial court, but being a part of the proceedings in the trial of the cause, taken and made *pari passu* by a sworn officer charged with the special duty, they are presumed to be correct until questioned and the contrary made to appear. Undoubtedly, the trial judge may disregard them if found by him to be inaccurate, but they are ordinarily accepted and acted upon, in practice, as the most reliable means of information attainable. If the stenographer, however, be not an official, the same result would follow,—the accuracy and fullness of the notes taken in the regular and orderly course of the trial would, when approved by the court, constitute *data* to which the court might refer.

It is apparent, independently of the fact that the transcript of the evidence, when properly certified by the trial judge, becomes part of the record, that the rule permitting the same judge, at a subsequent term of court, to amend the record by notes or memoranda made by himself during the trial, applies with equal, if not greater, force to the transcript of the evidence thus made and preserved. Every element of accuracy and certitude in the one is inherent in the other, while there is added, in the stenographic notes, fullness and completeness of detail impossible of attainment in memoranda kept by the judge; and where the judge has, in apt time, approved the transcript made by the stenographer, as being a correct

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Opinion of the Court.

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transcription of the evidence, there can be no objection to his referring to the same as accurate *data* upon which to predicate his future order in the cause,—and especially must this be so where the accuracy of the transcript made by the stenographer was, as here, unchallenged. Moreover, the judge in this case had certified to the stenographer's transcript of the evidence in apt time, while he yet had jurisdiction to do so, and made it part of the record. The certificate being informal, only, in that it failed to state that the transcript thus certified as a bill of exceptions contained all the evidence introduced and offered at the trial, it remains to determine whether there was, in the memorandum thus kept, and appearing upon the record and files in the cause, at the subsequent term, sufficient to warrant the making of the amended record.

As we have seen, the stenographer was, by law, required to keep full stenographic notes of all the evidence, and to faithfully transcribe the same. Independently of the presumption arising that the stenographer's transcript contained all the evidence, we think it affirmatively appears, from the transcript incorporated into the bill of exceptions, that all the evidence offered or introduced was contained therein. The evidence of the plaintiff is first given. Questions and answers in chief, cross and re-direct examinations, are given, and there is then the statement that the plaintiff here rested. Evidence for the defendant, in like manner, is then set forth, and is followed by the statement, "Counsel for the defendant here rested their case." There was then called by the plaintiff, witnesses in rebuttal, and the examination given in detail, which is again followed by the statement, "Counsel for the plaintiff here rested his case." Then follow the instructions asked and the rulings of the court thereon, motion for new trial and reasons therefor assigned, and the exceptions entered by the defendant, etc., followed by the formal certifi-



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Opinion of the Court.

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the judge under his hand and seal. At the foot, and margin of the bill, appears, "O. K.—Walker, Judd & y, for Pl'ff." It is not important, however, that the ff should be held to have consented to the correctness bill of exceptions by the "O. K." of his attorneys. The appearing in regular sequence and order,—the trans- of the evidence in each case being followed by the state- that the parties, respectively, rested their cause upon idence transcribed,—satisfactorily shows that no other ice was offered or introduced at the trial, and was *prima* ufficient to authorize the amendment of the record, so show that the bill of exceptions contained all the evi- introduced or offered at the trial.

s also objected that the amendment was improperly made separate and independent order and certificate of the . The objection is without merit. It was unnecessary, ould have been proper, for the judge to have interlined nendment in the original bill of exceptions. That would necessitated re-transcribing the entire bill of exceptions, by subjecting the parties to additional costs for no ade- reason. By the order and certificate made October 30, , the amendment is clearly and sufficiently identified by eference to the original bill of exceptions filed, and may properly be treated as incorporated therein.

follows that we are of opinion that the Appellate Court l in affirming the judgment for the reasons stated in its order. Its judgment will therefore be reversed, and the e remanded to that court, with directions to consider and mine the cause upon its merits.

*Judgment reversed.*

## Syllabus.

ALLEN VANE *et al.*

v.

THE CITY OF EVANSTON.

*Filed at Ottawa June 19, 1894.*

61620 Fed 1

1. **SPECIAL ASSESSMENTS**—*sufficiency of description of proposed improvement.* A substantial compliance with the statute, which requires the ordinance for a local improvement to specify "the nature, character, locality and description of the improvement," will be sufficient.

2. An objection to an ordinance for the paving of a street, that it fails to provide for man-holes and catch-basins to convey from the pavement the surface water, dirt, etc., where a sewer has already been constructed in the street sufficient for the purpose, will not avail to defeat the assessment.

3. **SAME**—*discretion as to extent of local improvement.* The municipal authorities of cities and villages are made, by the statute, the judges of the utility of an improvement upon streets, and whether such improvement shall be treated as a local improvement in raising funds to pay for it, and their decision on these questions is final. Where the ordinance provides for an improvement complete in itself, it will not follow that the ordinance is to be deemed void because the utility of the improvement might be enhanced by the addition of something more which has been omitted.

4. **SAME**—*personal view by jury.* In a proceeding to confirm a special assessment by a city or village for a local improvement, the court has the power, in the exercise of a reasonable discretion, to permit, in proper cases, a view of the property assessed, or the *locus in quo*, by the jury, on the issue of benefits to the property specially assessed.

5. **PRACTICE**—*view by jury—when allowed.* At common law a personal view of premises was not granted as a matter of right, but the power rested in the sound discretion of the court, to be exercised whenever, in the nature of the case, it became necessary or important to a clearer understanding of the issues, and to enable the jury to properly apply the evidence.

6. The design of the practice of allowing a view by the jury was to enable them better to understand the matter in controversy between the parties; and it was not confined to real actions, but was allowed in several personal actions for an injury to real estate, as, trespass *quare clausum fregit*, trespass on the case, and nuisance.

7. At common law, as the same was adopted in this State, the view was allowed, or not, as the judge or court determined, in his or its dis-

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154 197  
155 663  
150 616  
75a 578  
75a 589  
150 616  
175 57  
79a 390

150 616  
187 \*398  
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94a \*203  
94a \*204

150 616  
195 \* 23  
e100a \*327

150 616  
103a \*125  
103a \*210

## Syllabus.

, that the view was proper or necessary to enable the jury better understand and apply the evidence introduced on the trial. The fact that the view may be controlled by an instruction to the jury.

**IMPE—improper remarks of counsel—waiver of objections.** If improper remarks are made by counsel in the presence of the jury, the objection of the court should be called to them in apt time, so as to enable the court to take proper action. If the court, upon objection made, fails or refuses to make the proper order, the question should be saved and presented for review, otherwise the party will be held to have waived his objection.

**IMPE—tampering with jury—ground of new trial.** Tampering with the jury by the successful party litigant, or doing any act out of the presence of the court which would have a tendency to bias or prejudice the consideration of the cause, will ordinarily afford sufficient ground for granting a new trial.

The parties, during the separation of the jury, are not permitted to draw them unusual civilities and attentions, and such attentions extended by the successful party, his counsel or partisans, and which create suspicion as to the motives of the party or the effect upon the jury, will ordinarily afford sufficient ground for the granting of a new trial. And furnishing the jurors with refreshments, and the like, the intention to and acceptance by them of gratuities, or, indeed, any approach to the jury casting suspicion that they have been tampered with or that their verdict has been improperly influenced, not satisfactorily explained, will ordinarily avoid the verdict, whether or not there was any actual intent or design to influence them or not.

It does not, however, follow, that customary offers of civilities, ordinary hospitality or courtesy extended by the successful litigant, not designed or calculated to influence the juror or jurors in the consideration of the case, and which are devoid of suspicion, will afford sufficient ground for setting the verdict aside.

In a proceeding to confirm a special assessment by a city, while the jurors were out of court, viewing the property assessed, they were treated to a free lunch by the attorney for the city. It appeared that the lunch was given on the suggestion of the court, before the jury retired. It was not shown that the jury, or any of them, knew, before they were finally discharged, that the lunch had been provided at the expense of the city: *Held*, that the case was not such as to vitiate the verdict in favor of the city.

**DECREED** from the County Court of Cook county; the Hon. GEORGE W. BROWN, Judge, presiding.

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Brief for the Appellants.

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Messrs. WILSON & ZOOK, for the appellants :

The ordinance does not specify the nature, character, locality and description of the improvement, as provided in section 19 of Hurd's Statutes. It does not specify catch-basins and man-holes, so that a proper estimate could with certainty be made of the cost thereof. One person might make an estimate for catch-basins and man-holes, another might not.

In the latter part of section 4, wooden curbing is to be held in place by white oak stakes, set not more than three feet apart. This makes it indefinite how many stakes are to be used. *Foss v. Chicago*, 56 Ill. 354; *Jenks v. Chicago*, id. 397; *Steele v. River Forest*, 141 id. 302.

All ordinances must be reasonable, and this one is not. *Hyde Park v. Carton*, 132 Ill. 100.

The court erred in sending the jury out to view the premises. *Doud v. Guthrie*, 13 Bradw. 653.

We know that the Supreme Court, in the case of *Springer v. City of Chicago*, 135 Ill. 552, has seemingly taken strong ground in the power of the court to send the jury out to view the premises; but we believe the court is in error.

The court erred in overruling objectors' motion for a new trial. The first point we call the court's attention to, is the improper influence brought to bear upon the jury through the improper remarks of Mr. Grover, in open court, in the hearing of the jury, in reference to the jury's viewing the premises, following that up by furnishing the conveyance to Evanston, then to the premises, then to lunch. This was all free to the jury, at the procurement of the city of Evanston. This was an unfair trial—a travesty upon justice. *Doud v. Guthrie*, 13 Bradw. 653; *Lyons v. Lawrence*, 12 id. 533; *Knight v. Freeport*, 13 Mass. 318; 2 Thompson on Trials, sec. 2560.

An attempt to influence a jury by other means than evidence and argument, on grounds of public policy, is always ground for new trial, without reference to the merits of the

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Brief for the Appellee.

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case, and whether successful or not. 2 Thompson on Trials, secs. 2564, 2565; *Ensign v. Harney*, 15 Neb. 330; *Pelham v. Page*, 6 Ark. 535; *Studley v. Hall*, 22 Me. 198; *Mining Co. v. Showers*, 6 Nev. 291; *Springer v. State*, 34 Ga. 379; *Drake v. Newton*, 23 N. J. L. 111.

The law is so sensitive upon this subject, that affidavits, not explained away, casting suspicion of such misconduct on the prevailing party, will avoid the verdict. *Huston v. Vail*, 51 Ind. 299; 2 Thompson on Trials, sec. 2560.

Mr. FRANK R. GROVER, for the appellee:

The ordinance is not defective in any respect. All the details of the work need not be set forth in the ordinance. A substantial compliance with the statute is all that is necessary. *Kankakee v. Potter*, 119 Ill. 324; *Pearce v. Hyde Park*, 126 id. 287; *Adams County v. Quincy*, 130 id. 566; *Woods v. Chicago*, 135 id. 582.

As to the view of the premises by the jury, see *Springer v. Chicago*, 135 Ill. 552; *Doud v. Guthrie*, 13 Bradw. 653.

The question whether the remarks of counsel were improper can not be saved except by seasonable objection, which, if overruled, should be followed by an exception, which exception should be noted and incorporated in the general bill of exceptions. 1 Thompson on Trials, sec. 962; *Turner v. State*, 68 Tenn. 206; *Roeder v. Studt*, 12 Mo. App. 566; *Rudolph v. Landeverlin*, 92 Ind. 34.

The remarks of counsel, to afford ground for a new trial, must have been objected to when made. 16 Am. and Eng. Ency. of Law, 527; *Skaggs v. Given*, 29 Mo. App. 612; *Huekill v. McCoy*, 38 Kan. 53; *Ross v. Davenport*, 66 Iowa, 548; *Powers v. Mitchell*, 77 Me. 361; *Railroad Co. v. Myrtle*, 51 Ind. 566; *Insurance Co. v. Edwards*, 74 Ga. 220; *Turner v. State*, 70 id. 765; *Morrison v. State*, 76 Ind. 335.

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Opinion of the Court.

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Mr. JUSTICE SHORE delivered the opinion of the Court:

This is an appeal by Allen Vane and others, objectors, from a judgment of the county court of Cook county, confirming a special assessment made for the purpose of paving Forest avenue, in the city of Evanston, from the south line of Davis street to the north line of Greenleaf street.

It is first insisted that the ordinance providing for the improvement, and under which the assessment was made, does not sufficiently specify "the nature, character, locality and description of the improvement." The particular objection is, that it nowhere provides for man-holes and catch-basins to convey from the pavement, surface water, dirt, etc. Section 1 of the ordinance provides that Forest avenue shall be paved, between the points named, with pure Trinidad asphaltum, and thus improved for a width of thirty-three feet, —sixteen and one-half feet on each side of the center line of said avenue, etc., according to specifications therein set out. Section 2 contains the specifications providing for roadway, grading, excavations, curbs and gutters, foundation, materials, etc., and setting out in detail the material to be used, and the mode of construction.

It has been held by this court, in numerous cases, that a description in substantial compliance with the statute is sufficient. (See *Gage v. City of Chicago*, 143 Ill. 157, and cases there cited.) There could, it would seem, be no mistake as to the "nature, character, locality and description" of this improvement, and we think the omission from the ordinance of provision for man-holes and catch-basins, in view of the fact, as will be seen hereafter, that a sewer and catch-basins already existed along Forest avenue, does not affect its validity. In the matter of making public improvements, the municipal authorities must be, and are, invested, under our statute, (Starr & Curtis, clause 7, sec. 63, art. 5, chap. 24,) with discretionary power. As said in *Louisville and Nashville Rail-*

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Opinion of the Court.

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*road Co. v. East St. Louis*, 134 Ill. 656: "Acting within the scope of the power conferred, \* \* \* the city council in cities and board of trustees in villages are the judges of the utility of an improvement upon streets, and whether such improvement shall be treated as a local improvement in raising funds to pay for it. Their decision on these questions is final." (See *Fagan v. Chicago*, 84 Ill. 227; *Illinois Central Railroad Co. v. Chicago*, 141 id. 586; Dillon on Mun. Corp. sec. 58.) Under the facts here shown, it rested wholly within the discretion of the city council to provide other or additional escapements for water, as they deemed for the public interest. The improvement provided for was complete within itself, and it does not follow that the ordinance is to be deemed void because the utility of the improvement might be enhanced by the addition of something more, which the council, in their discretion, have seen proper to omit.

The jury, under the direction of the court, against the objection of appellants, were permitted to view the premises, and this ruling is assigned for error. The statute (Starr & Curtis, sec. 147, chap. 24,) provides that in cases of this character "the hearing shall be conducted as in other cases at law." In the case of *Springer v. Chicago*, 135 Ill. 552, which was an action brought by Springer to recover damages occasioned to his property by the building of a viaduct and approaches in one of the streets of Chicago, upon review of the authorities in this country and England, it was held that at common law a view by the jury, in proper cases, is sanctioned; and in that case an order permitting a view of the *locus in quo* by the jury was expressly approved. It was also there said: "If at common law, independent of any English statute, the court had the power to order a view by jury, (as we think it plain the court had such power,) as we have adopted the common law in this State, our courts have the same power."

As these cases are required by statute to be conducted as other cases at law, there can, under the authority of the

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Opinion of the Court.

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*Springer case*, it would seem, be no question of the power of the court, in the exercise of a reasonable discretion, to permit, in proper cases, a view of the *locus in quo* by the jury. As we understand the authorities, at common law the view was not granted as a matter of right, but the power rested in the sound discretion of the court, to be exercised whenever, from the nature of the case, it became necessary or important to a clearer understanding of the issues, and to enable the jury to properly apply the evidence. This is illustrated in the note to 1 Burr. 253. The practice in regard to view by jury, as settled in the King's Bench, is thus stated: "Before the 4th and 5th Anne, c. 16, sec. 8, there could be no view until after the cause had been brought on for trial. If the court saw the question involved in obscurity, which might be cleared up by view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the court or judge, at the trial, 'that the nature of the question made a view not only proper, but necessary,' for the judges at the assizes were not to give way to the delay and expense of the view, unless they saw that the cause could not be understood without one. However, it often happened, in fact, that upon the desire of either party, causes were put off for want of a view, upon specious allegations, from the nature of the question 'that a view was proper,' without going into the proof so as to be able to judge whether the evidence might not be understood without it. This circuitry occasioned delay and expense, to prevent which, the 4th and 5th Anne, c. 16, sec. 8, which empowered the court at Westminster to grant a view," etc., was enacted. The practice under the statute of Anne is then stated, but as its passage was subsequent to the fourth year of James I., it was not adopted in this State, and consideration of it is unimportant.

In Stearns on Real Actions, 102, in speaking of the practice of allowing view by jury, it is said: "The design of this pro-



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Opinion of the Court.

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ceeding was to enable the jury better to understand the matter in controversy between the parties. It was not confined to real actions, but was allowed in several personal actions for an injury to the realty, as, trespass *quare clausum fregit*, trespass on the case, and nuisance."

In 2 Tidd's Practice, 795, after stating that in actions of waste, etc., where it appears to the court, in vacation, to be proper and necessary that the jurors who are to try the issue should, for the better understanding of the evidence, have a view of the lands, etc., the court or judge will grant a rule for such view pursuant to the statute 4th Anne and 6th George IV, chap. 50, sec. 23, it is said: "Before the making of the above statutes there could have been no view till after the cause had been brought on to trial, when, if the court saw the question involved in any obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have view before it came on again."

These authorities are cited and relied upon in the *Springer case*, together with many others illustrating the rule. We do not deem it necessary to enter into a more extended review at this time. It is, however, apparent, that at common law, as the same was adopted in this State, the view was allowed or not, as the judge or court determined, in his or its discretion, that the view was proper or necessary to enable the jury better to understand and apply the evidence introduced at the trial, —and this we understand to be the holding in the *Springer case*. There, after showing that a correct plat of the premises, or a photograph thereof, would be competent evidence to go to the jury, there is propounded the inquiry, why, if the same is competent, the jury should not be permitted to look at the property itself of which the photograph or plat is a picture, and it is said: "If the appellant desired to control the effect the view might have on the jury, in connection with the other evidence introduced, that might have been done by an appropriate instruction." And further: "It is apparent that the

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Opinion of the Court.

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jury could obtain a much better understanding of the issues presented by the pleadings, by a view of the premises, and in the exercise of a sound legal discretion we think the court did not err in allowing the view."

It seems clear, therefore, from the authorities, that the only purpose of permitting the jury to inspect and view the *locus in quo* is to better enable them to understand the matter in controversy between the parties, and to clear up any obscurity that may exist in the application of the evidence introduced in the cause. The Eminent Domain act declares that the jury shall, in condemnation cases, at the request of either party, go upon the land, (Rev. Stat. chap. 47, sec. 9,) and we have repeatedly held that the information derived by the jury from their personal view and inspection of the premises is to be considered by them, in connection with the other evidence in the case. Such was not the rule at common law, the purpose of the view being, as stated, simply to enable the jury to understand the issue, and apply the evidence. They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view. To allow that to be done would be wholly inconsistent with the principles controlling in common law trials, and introduce great uncertainty in the trial of all common law causes where a personal view was permitted. Parties never would know upon what the jury based their finding, and the court would be in no position to control the evidence upon which it is predicated, or determine whether the verdict was based upon competent or upon the consideration of incompetent and illegal matters not admissible under the issues. We are not, however, prepared to hold that there was, in this case, any abuse of the discretion lodged in the court. Appellants might, if they had desired, limited the effect of the view, as said in the *Springer case*, to its only legitimate purpose. Having failed to ask such an instruction, they are in no condition to complain.

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Opinion of the Court.

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It is objected that counsel made improper remarks in the presence and hearing of the jury. It is sufficient to say, that such remarks were not objected to and an exception taken at the time they were made. The rule is, that the attention of the trial court should be called to irregularities of this kind by objection in apt time, thus enabling the court, by proper order, to counteract any prejudicial effect therefrom upon the jury, and if the court, upon objection being made, fails or refuses to make the proper order, the question can be saved and presented on review, otherwise the party will be deemed to have waived his objection. 1 Thompson on Trials, sec. 692; *Earll v. People*, 99 Ill. 123; *Sanitary District v. Cullerton*, 147 id. 385.

It is objected that the jury, while out of the presence of the court, on their view of the premises, were furnished lunch at a hotel in Evanston, at the expense of the city, the prevailing party to the suit, and that fact having been shown upon the motion for new trial, the court erred in not awarding the same. Tampering with juries by the successful party litigant, or doing any act out of the presence of the court which would have a tendency to bias or prejudice them in the consideration of the cause, will ordinarily afford sufficient ground for granting a new trial. No right is more valuable to the citizen, or more important in the due and orderly administration of justice, than that jurors should be kept absolutely free from anything that might improperly influence their deliberations. The rigidity of the common law, by which the jurors were kept together, practically as prisoners of the court, until they had agreed upon a verdict, (3 Coke's Litt. 227 b,) has, under the advanced conditions of society, been practically disregarded by the courts. It is now the customary practice for the court, in the exercise of its sound discretion, and under cautionary directions as to their duty, to allow the jury to separate, pending the trial, (Thompson & Mer. on Juries, sec. 10, *et seq.*) and to allow them suitable food, etc., upon its

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Opinion of the Court.

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proper order. The parties are not, however, permitted to show to the jury, during their separation, unusual civilities and attentions. Such attentions practiced by the successful party, his counsel or partisans, and which excite suspicion as to the motive of the party or effect upon the jury, will ordinarily afford sufficient ground for the granting of a new trial. Furnishing the jury or jurors with refreshments, and the like, by the successful party, the extension to and acceptance by them of gratuities, or, indeed, any other approach to the jury casting suspicion that they are tampered with or that their verdict has been improperly influenced, not satisfactorily explained away, will ordinarily avoid the verdict, whether there was any actual intent or design to influence them or not. *Huston v. Vail*, 51 Ind. 299; *Martin v. Morelock*, 32 Ill. 485; 2 Thompson on Trials, 2560-2565, and cases in note; 16 Am. and Eng. Ency. of Law, 529, and cases in note.

This doctrine is based upon the ground that public policy requires, and the pure and orderly administration of justice demands, that the jury, to whom the law commits the rights, liberties and lives of men, should be kept absolutely free from suspicion. The law will not tolerate the slightest suspicion that the successful litigant has corrupted or improperly influenced the jury, or that the jurors have been, directly or indirectly, tampered with, lest justice be subverted and its administration be brought into contempt. It does not, however, follow, that customary offices of civility, and ordinary hospitality or courtesy, extended by the successful litigant, when not designed or calculated to influence the juror or jurors in their consideration of the case, and which are devoid of suspicion, will afford sufficient ground for setting the verdict aside and awarding a new trial. *Tripp v. Connors*, 2 Allen, 556; *Carlisle v. Sheldon*, 38 Vt. 440; *Eakin v. Canal Co.* 4 Zab. (N. J. L.) 538; *Johnson v. Green*, 17 Neb. 447; 2 Thompson on Trials, 2565.

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Opinion of the Court.

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There was in this case no purposed tampering with the jury. The jurors were sent a distance of twelve miles, between the hours of ten and eleven o'clock A. M., to view the premises. The evidence to support the motion is the affidavit of one of the jurors, in which it is stated that the "luncheon was without cost or charge to affiant or said jury, but was, as affiant understood it, at the request of said Grover" (attorney of appellee) "to said city of Evanston." Whether he learned of the fact, or "understood" that the attorney of appellee furnished the lunch, before or after the rendition of the verdict, does not appear. The counter-affidavits filed satisfactorily explain the alleged misconduct. The affidavit of the attorney, which is not controverted, states: "Evanston is twelve miles away, and it was necessary and convenient for jury to go on said road, and premises are about three-quarters of a mile from depot, and necessary for jury, in viewing premises, to ride in omnibus. The jury were sent by the court between ten and eleven o'clock A. M., and immediately after order was entered by court to make view, court called affiant to the bench, and stated to affiant that it would be impossible for jury to return to Chicago and the court house before dinner, and some arrangements should be made where they and bailiff could secure dinner in Evanston. Affiant, acting under instructions of the court, (attorney for objectors having left the court room,) telephoned to Quinlan, at Evanston, one of the managers of Avenue House in Evanston, to provide lunch for jury and bailiff at the expense of said city of Evanston, in case jury and bailiff shall call for the same. Affiant expressly instructed Quinlan that no information should be conveyed to jury as to who had provided for the lunch aforesaid, or who had become liable therefor, or who had agreed to pay for the same. Since trial of the cause affiant has made diligent inquiry of said Quinlan and others, and he is informed and believes, and so states fact to be, that none of said jury knew or were in any manner in-

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Opinion of the Court.

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formed, prior to bringing in their verdict, as to who had made provisions for such lunch." It appears that the arrangement was made at the suggestion of the court, and while it can not be said that the proper mode was adopted, it undoubtedly absolves counsel for appellee from any intentional wrong-doing. It is not shown affirmatively that the jury, or any of them, knew before they were finally discharged that lunch had been provided at the expense of one of the parties, and we can not say, in view of the facts submitted, that the court erred in holding that sufficient cause was not shown to justify setting aside the verdict.

It is also insisted that the verdict is not sustained by the evidence. The objectors introduced evidence tending to show that there were insufficient out-lets provided for the escape of surface water, and that it would accumulate and render the improvement valueless to adjacent property, etc. The city introduced evidence tending to show that a sewer already existed along Forest avenue, and which had ten catch-basins, and was sufficient for this purpose. It was shown that at all street intersections, four in number, and at Lincoln Place, there were catch-basins. There is nothing in this record tending to show that the commissioners appointed to make an estimate of the total cost of the improvement, took into consideration other or additional catch-basins. There can be no presumption, in the absence of proof, that they based their estimate upon anything other than the specifications contained in the ordinance.

There was, as usual, conflict in the evidence as to benefits to property affected. There is in this record ample evidence to sustain the finding of the jury. They saw the witnesses, and had means and opportunity of judging of their credibility and the weight to be given to their evidence, which we do not possess. We are not prepared to say that the court erred in approving the verdict.

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Syllabus.

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We have carefully examined the instructions, and find, taking them as a whole, that they stated the law with substantial accuracy, as applied to the facts of the case. Slight objections to the instructions given in behalf of the city undoubtedly exist, but these are fully obviated and corrected by those asked and given at the instance of the objectors. There is in this case no such conflict in the instructions as that the jury must choose between them, and no good purpose could be served by a consideration *in extenso* of the objections made. Appellants have, in our opinion, no reason to complain of the law as given to the jury.

Other minor objections are raised, which we have given careful consideration, but do not deem them of sufficient importance to warrant discussion.

We find no such prejudicial error in this record as will justify reversal of the judgment of the county court, and it will accordingly be affirmed.

*Judgment affirmed.*

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THE CARY-LOMBARD LUMBER COMPANY

v.

JAMES A. FULLENWIDER.

*Filed at Ottawa June 19, 1894.*

150	629
166	645

1. **MECHANIC'S LIEN**—*statute to be strictly pursued.* This court has repeatedly held that the statute relating to mechanic's liens is to be strictly pursued, and that a party seeking a lien thereunder must show compliance with its provisions.

2. **SAME**—*sub-contractor—section 29 of Lien act construed.* Section 29 of the Lien act creates a lien in favor of a sub-contractor or material-man, without limitation other than that the liens therein authorized shall not exceed the price fairly stipulated to be paid by the owner to the original contractor for the building or improvement made, and shall not exceed the amount of indebtedness due from the owner to the original contractor.

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Syllabus.

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3. *SAME—sections 30 and 31 of the act construed.* The purpose of sections 30 and 31 of the act relating to *méchanic's liens* was to require notice to the owner, to the end that he should be protected against liens of which he had no notice, and the notice thereby required applies to sub-contracts not completed when it was given. Section 31, requiring notice to be served within forty days from the completion of the sub-contract, is a limitation of the time, beyond which notice will cease to be effective to protect the rights of the sub-contractor under section 29 of the act.

4. *SAME—time of service of notice by sub-contractor.* The notice which a sub-contractor is required to give the owner, under section 31 of the act, in order to preserve his lien, may be given at any time after the sub-contract is made, and before the expiration of forty days after completion of the sub-contract, or forty days after payment should have been made to the person performing labor or furnishing the materials.

5. *SAME—contract payable in monthly installments.* A contract was made for the furnishing of materials to be used in the erection of a building, the same to be furnished as the work progressed, and to be paid for in monthly payments, so that all the materials supplied in any month were to be paid for on the first of the next succeeding month: *Held*, that the contract was an entire contract, and that the sub-contractor was not bound to sue on each installment as it fell due, in order to maintain a mechanic's lien, but might wait until the entire debt matured.

6. *SAME—limitation to enforcing sub-contractor's lien.* Section 47 of the act requiring the petition to enforce the lien created by section 29, in favor of sub-contractors, to be filed within three months from the time of performance of the sub-contract or doing the work, etc., as a limitation law, does not begin to run, in case of a contract payable in installments, until the last installment matures or the entire debt is due.

7. *SAME—requiring statement of sub-contractor.* The owner, having notice of the claim of the sub-contractor, may require the statement, under oath, of the contractor, provided for under section 35 of the act, showing the persons employed, the sub-contractors, the terms of the sub-contracts, and how much is due to them, and thus protect himself in all settlements with the contractor.

8. *CORPORATION—service of notice.* A notice given by a corporation claiming a mechanic's lien as a sub-contractor, is not insufficient because signed by the corporation, by its attorney, and not under the corporate seal.



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Opinion of the Court.

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APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

Mr. ISRAEL COWEN, for the appellant.

Mr. JAMES A. FULLENWIDER, *pro se*.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was a proceeding to enforce a mechanic's lien by appellants for material furnished to a contractor with appellee, who erected a house for appellee upon certain lots of which he was owner. Section 29, chapter 82, of the statute, gives to every sub-contractor, mechanic, workman or other person who shall, in pursuance of the purposes of the original contract between the owner of any lot or piece of ground and the original contractor, perform any labor or furnish any material in building, altering, repairing, etc., any house or other building, shall have a lien for the value of such labor and materials, upon the house and lot, etc. Section 30 of the act provides that the person performing such labor or furnishing material shall cause a notice, in writing, to be served on the owner or his agent, the form of which notice is prescribed by the statute; and it is provided therein that such notice shall not be necessary when the sworn statement of the contractor, provided for in section 35 of the act, shall serve to give the true owner notice of the amount due and to whom due. (See *Butler & McCracken v. Gain*, 128 Ill. 23.) Section 31 of the act is as follows: "If there is a contract in writing between the contractor and the sub-contractor, a copy of said sub-contract, if the same can be obtained, shall be served with said notice and attached thereto, which notice shall be served within forty days from the completion of said sub-contract, or within forty days after payment should have been made to the person performing such labor or furnishing such material."

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Opinion of the Court.

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We have repeatedly held that the law is to be strictly construed, and that a party seeking a lien thereunder must show compliance with its provisions. *Butler et al. v. Gain, supra*, and cases cited on page 27.

The principal difficulty in this case arises in construing section 31. It is contended, and has been held by the lower courts, that to preserve a sub-contractor's or material-man's right to a lien, the notice must be served upon the owner after the completion of the sub-contract, or after payment should have been made to the person performing such labor or furnishing the material, and within forty days after the completion of the sub-contract or after the maturity of payment, and that a notice served prior to completion of the sub-contract, or prior to the time when payment should be made by the person performing the labor or furnishing the material, is not a compliance with the statute, and effective to preserve the lien. In this case it appears that, under the sub-contract, appellants, on February 2, 1892, commenced delivering to the contractor and builder, lumber and material to be used in erecting the building. By the contract all materials delivered in one month should be paid for on the first day of the succeeding month. The lumber delivered in February amounted to \$214.70, and the balance, amounting in gross to \$1241.45, was delivered in March, April, May and June, the last delivery being on the 16th day of the latter month. It is not seriously questioned that this was an entire contract, payments to be made as stipulated.

On February 8, six days after the sub-contract was entered into, and after the delivery of material had begun, appellant served a notice upon appellee, as owner, which, in form, was in strict compliance with the statute. It is said, that to preserve the lien, the notice should have been given after the completion of the delivery, June 16, and within forty days thereof, or after and within forty days of the first day of each month in which the lumber was delivered, for the payment

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Opinion of the Court.

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then falling due under the contract. We are not inclined to adopt this construction. It is to be observed that the 29th section of the statute creates the lien in favor of the sub-contractor or material-man without limitation, other than that the liens therein authorized shall not exceed the price fairly stipulated to be paid by the owner to the original contractor for the building or improvement made, and shall not exceed the amount of indebtedness due from the owner to the original contractor. (Sec. 33.) The purpose of sections 30 and 31 was to require notice to the owner, to the end that he should be protected against liens of which he had no notice. That the legislature had this purpose in view is clearly evinced by the proviso to section 30, that "such notice shall not be necessary where the sworn statement of the contractor provided for in section 35" of the act "shall serve to give notice to the true owner of the amount due and to whom due." And in the *Butler-Gains case, supra*, it was held, that where the contractor furnished the owner with a sworn statement, as provided in section 35 of the act, all the purposes intended by the notice provided for in section 30 are accomplished, and that the sub-contractor or material-man would not be required to serve the notice provided for in the latter section.

It might again be remarked that there is nothing in the prescribed notice to indicate that the work has been completed or that the money is due. It is: "You are hereby notified that I have been employed by . . . . . to (here state whether to labor or furnish material, and substantially the nature of the undertaking, etc.,) and that I shall hold the building, etc., liable for the amount that is or may become due me on account thereof." It is apparent that, within the legislative contemplation, the notice would apply to contracts to labor or furnish material in the future, as well as to sums of money to become due; and while the substance of the notice, or substantial form of it, only, is prescribed, it clearly shows that the attention of the legislature was directed to, and the notice

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Opinion of the Court.

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intended to apply to, sub-contracts not completed when it was given.

Keeping in view the purpose of requiring notice to enable the sub-contractor or material-man to enforce a lien upon the building and lot, what is fairly intended by the requirements of section 31, that the notice shall be served within forty days from the completion of the sub-contract, etc.? It was clearly intended to place a limitation of time, beyond which notice would cease to be effective to protect the rights of the sub-contractor under section 29 of the statute. The legislature has fixed forty days from or after the completion of the sub-contract, or from or after the time payments thereunder would become due, as the period after which notice would cease to be effective to preserve the sub-contractor's lien. This seems to admit of no controversy. "From the completion of the contract" would necessarily mean "after" the completion of the contract. But it will be observed that the statute does not prescribe that the notice shall be served within *the forty days* from or after the completion of the contract, etc. True, it says the "notice shall be served within forty days from the completion" of said sub-contract; but the word "within," as here employed, is clearly used as a preposition, and in the sense that the service of notice is to be within the limit or compass of forty days after the completion of the sub-contract or the maturity of payments thereunder, and not later. The second definition given by Webster is: "in the limits or compass of; not further in length than; not exceeding in quantity;" and the third: "inside the limits of; not going outside of; not beyond or exceeding." And it seems too clear for argument that the clause of the statute is to be read, that said notice shall be served not beyond, or later in time than, forty days after the completion of the sub-contract or the maturity of payment. No other construction is reasonable, in view of the purposes and intent of the legislature in requiring the notice to be given. (*Havighorst v. Lindberg*, 67 Ill. 463.) If

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Opinion of the Court.

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the object is to notify the owner, so that he shall reserve in his settlements with the original contractor sufficient to discharge sub-contractors' liens, which would be eminently just and in accordance with the spirit of the statute, that end is as well accomplished by a notice served before the completion of the work or furnishing of material, or before the indebtedness of the contractor to the sub-contractor matures, as it would be by its subsequent service. The owner, having notice of the claim of the sub-contractor, may require the statement, under oath, of the contractor, provided for in section 35 of the act, showing the persons employed, the sub-contractors, the terms of the sub-contracts, and how much is due to any of them, and thus protect himself in all settlements with the contractor. By the 36th section of the act a penalty is imposed upon the contractor for failure to make such statement whenever requested. Indeed, by the service prior to the completion of the work the rights of all parties are preserved, and this was the evident purpose and intention of the enactment. To hold otherwise would not only do violence to the language of the statute and the evident purpose and intention of the legislature, but would lead to the grossest abuses. In *Butler et al. v. Gain*, *supra*, we held, and properly, that while the owner might, under section 35 of the statute, require the sworn statement from the contractor therein prescribed to be made, yet he was not obliged to do so, and that to protect the lien of the sub-contractor, if such sworn statement was not made, the sub-contractor, to protect himself, must give the notice required by sections 30 and 31. And it would follow, that if the sub-contractor may not give notice before the completion of the sub-contract, or before the payment thereunder matures, a settlement between the owner and the original contractor before such completion or maturity would be an effectual bar to the enforcement of the sub-contractor's lien. *Northwestern Railroad Co. v. Howison*, 81 Va. 125; 2 Jones on Liens, sec. 1286.

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Opinion of the Court.

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Further discussion need not be indulged. The statute clearly contemplates the giving of notice at any time after the sub-contract is made and before the expiration of forty days from the completion of the sub-contract, or forty days after payment should have been made to the person performing the labor or furnishing the material.

It is objected that the notice was insufficient, because signed by the sub-contractor by its attorney, and without the seal of the corporation. Whatever may have been the holding formerly, at common law, under the rule as it has been relaxed in this country and in England, the contention is without merit. "In this country, where private corporations for every purpose are so multiplied that their facility for action has become a matter of public importance, in the language of Kent, (2 Kent's Com. 289,) 'the old technical rule has been condemned as impolitic, and essentially discarded.'" Angell & Ames on Corp. secs. 282, 219; *Donehoe v. Scott*, 12 Pa. St. 45; Story on Agency, 47-52, and cases cited.

The ground of demurrer that the bill was not filed within the time limited by the statute, is also untenable. Section 47 of the act requires that the petition to enforce the lien created by section 29 of the act shall be filed within three months "from the time of performance of the sub-contract or doing the work or furnishing the materials," etc. The bill alleges a verbal contract between complainant and the contractor, by which the former was to furnish lumber to be used in the construction of the building, "as the progress of the building required." It is then alleged that the performance of this contract was completed June 16. The bill was filed August 25 following, and within three months from the performance of the sub-contract, and the contention is therefore without force.

The notice given, as we have seen, in compliance with the statute, applied to all the material delivered under the sub-contract, and the lien for the amount accruing therefor was

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Opinion of the Court.

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in nowise affected by the fact that by the terms of the original sub-contract it was to be paid in installments. The sub-contractor was not required to bring suit for each separate installment, or within three months of the maturity of each installment, but within three months of the performance of the sub-contract.

We are of opinion that the circuit court erred in sustaining the demurrer and dismissing the amended bill. The judgment of the Appellate Court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court for further proceeding not inconsistent with this opinion.

*Judgment reversed.*





# INDEX.

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## ADMISSIONS.

### HEARSAY EVIDENCE.

*Admissions and threats of third parties.* See CRIMINAL LAW, 18.

## ALIBI.

### BURDEN OF PROOF.

*Creating a reasonable doubt.* See CRIMINAL LAW, 13, 14.

## AMENDMENTS.

### OF DECLARATION.

1. *After introduction of evidence.* Where the defendant moves the court to exclude all of the plaintiff's evidence, the latter may, by leave of court, amend his declaration. *Grimes v. Hilliary*, 141.

### OF BILL OF EXCEPTIONS.

2. *How made—preserving the record.* See EXCEPTIONS AND BILLS OF EXCEPTION, 2 to 7.

### DISCRETION OF THE COURT.

3. *Amending the bill on hearing.* See CHANCERY, 1.

## ANNEXATION OF TERRITORY.

### TO A CITY OR VILLAGE.

*A question of policy—whether reviewable.* See MUNICIPAL CORPORATIONS, 6, 7, 8.

## APPEALS AND WRITS OF ERROR.

### WHO MAY PROSECUTE.

1. *Parties in interest.* One not a party to a decree, authorizing an administrator to sell lands to pay debts of the intestate, and who is not shown in any way to have any interest in the subject matter of the litigation, can not maintain an appeal or writ of error to reverse the decree. *Louisville, Evansville and St. Louis Consolidated Railroad Co. v. Surwald*, 394.

# APPEALS AND WRITS OF ERROR. WHO MAY PROSECUTE. *Continued.*

2. It is a familiar rule that a party can not complain of a judgment or decree which does not affect him or his property in some manner. As a general rule, a writ of error should be sued out in the same names in which the proceedings in the circuit or trial court were conducted. *Louisville, Evansville and St. Louis Consolidated Railroad Co. v. Survald*, 394.

3. *Laying out a highway—trial de novo.* See HIGHWAYS, 8.

## INTERLOCUTORY ORDER.

4. *Whether appeal lies—order to produce books.* An order of court requiring a defendant to place his private books in the hands of its clerk, that they may be inspected by the plaintiff and his attorney, with leave to examine the same and take copies of the entries therein, to enable them to prepare for trial, is not a final judgment, reviewable on appeal or writ of error, when no steps are taken in execution of such order. *Lester v. People*, 408.

5. *Judgment imposing a fine for contempt of court.* But if the court, on defendant's refusal to comply with such order, attempts to enforce the same by the imposition of a fine, with an order for an execution for its collection, or by a definite term of imprisonment, as for a contempt of court, the judgment of the court imposing such fine or imprisonment will be final, and an appeal will lie from it. *Ibid.* 408.

## CONSTRUCTION OF CONSTITUTION INVOLVED.

6. *Appeal lies directly to this court.* Where the construction of a constitutional provision is involved in an order or proceeding, an appeal lies directly from the trial court to this court. *Ibid.* 408.

## VALIDITY OF A STATUTE.

7. *Whether involved—certiorari.* In a proceeding by certiorari to quash the proceedings of a village board of trustees in annexing territory to the village, the court was asked to hold as law that the act under which the proceeding was had was unconstitutional and void, which was refused: *Held*, that the validity of a statute was involved, and this court had jurisdiction of an appeal taken directly to it. *Whittaker et al. v. Village of Venice et al.* 195.

## WHAT MATTERS TO BE CONSIDERED.

8. *Absence of bill of exceptions.* In the absence of a bill of exceptions this court can not consider the correctness of the rulings of the trial court, except such errors as appear upon the face of the record proper. *Helmuth et al. v. Bell et al.* 263.

9. *No certificate of evidence or bill of exceptions.* Where no certificate of evidence and no bill of exceptions are preserved in the record of a chancery suit, this court will be confined to the finding of facts in the decree alone. *Dawson et al. v. Vickery*, 398.

## LS AND WRITS OF ERROR.

### MATTERS TO BE CONSIDERED. *Continued.*

1. *Amount of damages—a question of fact.* The amount of damages sustained by the plaintiff in an action at law is a question of fact, which is not open for consideration in this court. *West Chicago Railroad Co. v. Bode*, 398.

2. *Excessive damages—former decisions.* The ruling of this court in *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183, and *Chicago and Northwestern Railway Co. v. Jackson*, 55 id. 492, holding that this court might pass upon the fact whether the damages awarded are excessive, was made before the passage of the statute regarding the finding of facts by the Appellate Court conclusive in this court. *Ibid.* 398.

### TRUING QUESTIONS OF FACT.

1. *Settlement of a guardian's account.* The finding of the facts by the Appellate Court in respect to the settlement of a guardian's accounts is not conclusive on this court on appeal from that court, but this court may adjudicate in respect to controverted questions of fact. *Rawson v. Corbett et al.* 468.

2. *Negligence of deceased a question of fact.* In an action by an administrator of a deceased person, against a railway company, negligently causing the death of the intestate, the negligence of the deceased is a question of fact, settled conclusively by the judgment of the Appellate Court in affirming the judgment of the trial court. *Lake Shore and Michigan Southern Railway Co. v. Heasler*, 546.

3. *Excessive damages.* On appeal from the Appellate Court it can be assigned for error that the damages are excessive. *Ibid.* 546.

### APPEALS FROM THE APPELLATE COURT.

1. *Questions presented—as shown by the opinion.* On appeal from the Appellate Court this court can not consider the opinion of that court for the purpose of showing that the judgment of affirmance of the trial court was in reality the result of its finding that there was no bill of exceptions properly in the record. *Ibid.* 546.

### APPELLATE COURT.

2. *Recital of facts in the final order.* If the Appellate Court affirms the judgment of the trial court because of the incompleteness of the record, without a consideration and determination of the errors assigned, it should recite that fact in its final order, so as to present the question thus arising, to this court on further appeal. *Ibid.* 546.

3. *Duty to pass upon the errors assigned.* Where the bill of exceptions is properly certified that it contains all the evidence, it is the duty of the Appellate Court to consider and determine the

**APPEALS AND WRITS OF ERROR. APPELLATE COURT. Continued.**

errors assigned, and it will be error to refuse to pass upon them. *Chicago, Milwaukee and St. Paul Railway Co. v. Walsh*, 607.

**REMITTITUR.**

18. *In the Appellate Court—judgment for the remainder.* A plaintiff in an action sounding in damages, on appeal to the Appellate Court, and after an order of reversal, on his motion had the judgment of reversal set aside, and entered a *remittitur* of one-half of the amount of the verdict, whereupon the Appellate Court entered judgment for the balance of the amount: *Held*, that the Appellate Court was authorized to allow the *remittitur*, and that in so doing and entering judgment for the remainder there was no error. *North Chicago Street Railroad Co. v. Wrison*, 532.

**BILL OF EXCEPTIONS.**

19. *Incorporating in the transcript of the record.* The original bill of exceptions can not be used as a part of the transcript of the record, on appeal, without agreement of the parties. *Lake Shore and Michigan Southern Railway Co. v. Hessions*, 546.

20. *Stipulation to use original bill of exceptions in the transcript.* The parties to a suit filed in the office of the clerk of the circuit court, in the cause, this stipulation: "It is hereby stipulated and agreed that the original bill of exceptions, instead of a copy, may be used in making up the record in the above entitled cause." *Held*, that the use of the original bill of exceptions was in making up the transcript of the record for the Appellate Court, and not the record of the trial court. *Ibid.* 546.

21. Where the parties file in the trial court a stipulation that the original bill of exceptions may be used in making up the record, and such bill is embodied in the transcript of the record, on appeal to the Appellate Court, and the parties submit the case upon its merits, without objection to the original bill of exceptions, it was *held*, it was agreed that such bill of exceptions should be incorporated into the transcript of the record to be used on the appeal. But if it were otherwise, the appellee, by failing to object to the transcript in the Appellate Court, and submitting the cause in that court on its merits, waived the objection that the original bill, instead of a copy, was used. *Ibid.* 546.

**PETITION FOR REHEARING.**

22. *Effect on judgment.* The filing of a petition for a rehearing, under the rules of this court, will have no greater effect than to stay the execution of the judgment pending the petition, and the overruling of the petition will leave the judgment in full force as of the date of its rendition. *Lester v. People*, 408.

APPLICATION OF PAYMENT. See PAYMENT, 1.

ARSON. See CRIMINAL LAW, 15, 16, 17.

## ASSIGNMENT.

### OF CHOSE IN ACTION.

1. *No particular form required.* In order to constitute a valid assignment of a debt or other chose in action, in equity, no particular form of words is necessary. Any words are sufficient which show an intention of transferring or of appropriating the chose in action to the assignee for a valuable consideration. *Savage v. Gregg*, 161.

2. *For collection—rights of assignee—collection of claim by assignee.* A, the owner of a claim against a bank, made an agreement with B, an attorney, and one C, by which B was to bring suit against the bank in the name of A for the use of C, and C was to advance money to prosecute the suit and pay costs and expenses. The money was to be collected by B, and after deducting certain expenses and fees, the residue of the money was to be paid, one-half to A and the other half to C: *Held*, that C had a valid, subsisting interest, which he might properly transfer or assign to another, at least in equity, so as to enable the assignee to collect the proceeds of the claim. *Ibid.* 161.

3. *Acceptance—exempt from garnishment.* Where an entire claim in the hands of an attorney for collection is sold and assigned by a debtor to his creditor, no formal acceptance by the attorney is required in order to pass the debtor's interest therein and place the same beyond the reach of garnishment by other creditors, and the fact that the claim may not be assignable at law will not prevent the debtor from making an equitable assignment of the same, which may be enforced and protected in a court of law. *Ibid.* 161.

### FOR THE BENEFIT OF CREDITORS.

4. *What constitutes—preferring creditors.* See INSOLVENT DEBTORS, 1 to 5.

## ATTORNEY AT LAW.

### DEFRAUDING HIS CLIENT.

*Taking deed to defraud creditors.* See FRAUD, 1, 2.

## ATTORNEY'S FEE.

### FOR STATING AN ACCOUNT.

*Between guardian and ward—allowance.* See GUARDIAN AND WARD, 4.

## ATTORNEY GENERAL.

## REPRESENTATIVE OF THE PUBLIC.

1. *In the execution of a public trust.* Where the public is interested in the execution of a trust, the Attorney General is a proper party, either plaintiff or defendant, as the representative of the public. *Attorney General v. Newberry Library*, 229.

## BANKS AND BANKERS.

## BANK CHECK.

1. *Assignment "for deposit"*—charging back to depositor for non-payment. The payee of a check indorsed the same to his banker "for deposit," to be placed to the depositor's credit, and sent the same by mail to his banker. On receipt of the check the banker gave the depositor credit, on account, for its amount. The banker, after placing on the check, "For collection and return," forwarded it to the drawer for payment: *Held*, that the deposit of the check was, in legal effect, a negotiation of the same, so as to vest the legal title in the banker, with the right, on his part, to charge it back to the depositor in case it was not paid on presentment, and that the credit given the depositor in his account was a sufficient consideration for the assignment. *American Trust and Savings Bank v. Gueder & Paeschke Manf. Co.* 336.

2. *Proof of possession.* See EVIDENCE, 14.

## EMBEZZLEMENT.

3. *Act of June 4, 1879, construed.* The first section of the "Act for the protection of bank depositors," approved June 4, 1879, which makes the failure or suspension of any bank or banker within thirty days after receiving any deposit, *prima facie* evidence of an intent to defraud, on the part of such bank, etc., does not apply exclusively to criminal prosecutions under the act, but applies to civil proceedings as well, wherever acts done in contravention of that section are the subject of judicial investigation. *Ibid.* 336.

4. The statute making it embezzlement for an insolvent banker to receive on deposit from a depositor not indebted to him "any money, check, draft, bill of exchange, stocks, bonds or other valuable thing which is transferable by delivery," embraces in its terms checks not transferable by delivery, merely. The words "transferable by delivery," were intended to qualify the words "other valuable thing." So the receiving on deposit of any check, draft or bill of exchange, whether transferable by delivery or by indorsement, is within the meaning of the statute. *Ibid.* 336.

## BOOKS AND PAPERS.

## PRODUCTION FOR INSPECTION.

*In preparation for trial—order of court.* See EVIDENCE, 15 to 18.

## BOUNDARIES.

## DIVISION LINE.

1. *Established by parol agreement—when conclusive.* A parol agreement as to a division line between two tracts of land, not followed by possession in accordance with such line, will not pass title, or authorize ejectment by one party against the other. *Berg-hoefer v. Frazier*, 577.

2. It is well established that the owners of adjoining tracts of land may, by parol agreement, settle and establish, permanently, a boundary line between their lands, which, when followed by possession according to the line so agreed upon, is binding and conclusive between them and their grantees. *Ibid.* 577.

3. In such case, the line is established, not by transfer of title of either to the other, as that can only be done by deed properly executed, but such settlement determines the location of the existing estate of each, and, when followed by possession and occupancy, binds them, not by way of passing title, but as determining the true location of the line between their lands. *Ibid.* 577.

4. *Estoppel to dispute.* Where the owners of adjoining premises have agreed upon the line, or agreed upon a mode by which it shall be determined, and have accepted and acquiesced in it by the unequivocal act of taking possession according to the line, they and their grantees are estopped from afterwards disputing it. *Ibid.* 577.

## CERTIORARI.

## OBJECT OF THE WRIT.

1. *Trial by the record alone.* The object of the common law writ of *certiorari* is to bring up the record of a proceeding from an inferior to a superior tribunal. When the return is made the superior tribunal tries the case, not upon the allegations of the petition, nor upon any issue of fact, but by the record alone, and upon the inspection thereof. It is the duty of the court to determine whether the inferior court had jurisdiction, and whether it exceeded its jurisdiction, or otherwise proceeded in violation of law. *Whittaker et al. v. Village of Venice et al.* 195.

2. *Mode of trial—judgment.* The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court, to determine whether the former had jurisdiction, or has exceeded its jurisdiction, or has failed to proceed according to the essential requirements of the law. The trial is solely by inspection of the record, no inquiry as to any matter not appearing by the record being permissible; and if the want of jurisdiction or illegality appears by the record, the proper judgment is that the record be quashed. *Smith v. Comrs. of Highways et al.* 385.

CERTIORARI. *Continued.*

## WHEN THE WRIT LIES.

3. The common law writ of *certiorari* may be awarded to all inferior tribunals and jurisdictions, when it appears that they have exceeded the limits of their jurisdiction, as, in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing the proceedings. *Smith v. Comrs. of Highways et al.* 385.

4. *When not the proper remedy—matters considered.* Where the controversy involves the investigation of facts not appearing in the record, *certiorari* is not the proper remedy. When brought to test the legality of proceedings to lay out a highway, a former proceeding for the laying out of a road over the same route is not a part of the record sought to be reviewed, and can not be considered. *Ibid.* 385.

5. Proceedings of an inferior tribunal can not be brought before the circuit court for review upon writ of *certiorari* when this right of review exists upon appeal, and if a writ be improvidently issued in such case it should be dismissed. *Wright v. Highway Comrs. of the Town of Carrollton*, 138.

6. While, by the adoption of the common law, we have adopted the common law remedy by *certiorari*, the law is, that such writ will lie only where no appeal or other mode of directly reviewing the proceeding of the inferior tribunal is provided by law. *Ibid.* 138.

7. The act of an inferior tribunal which can be reviewed on *certiorari* by a superior tribunal must be judicial or quasi judicial in its character. The act to be reviewed must not be legislative or ministerial. *Whittaker et al. v. Village of Venice et al.* 195.

8. The action of the board of trustees in annexing territory to a village under section 1 of "An act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," approved April 10, 1872, is not such judicial action as will authorize a review of the proceeding by *certiorari*. *Ibid.* 195.

9. Upon the return of the record the court has no power to form and try an issue of fact in regard to the jurisdiction of the inferior tribunal, nor to review the testimony heard below, nor to inquire into the correctness of the decision on that testimony. The trial is confined to the record, and extrinsic evidence is inadmissible. *Ibid.* 195.

## CHANCERY.

## AMENDMENTS.

1. *Discretion of the court—amending bill on the hearing.* It is within the discretion of the court to allow a complainant to amend



CHANCERY. AMENDMENTS. *Continued.*

his bill on the hearing, where the amendment works no injustice or hardship to the defendant. Where the record shows that the defendant is also granted leave to amend his answer, and it does not appear that any exception was taken to the ruling of the court overruling the objection to the complainant's amending his bill, or that any suggestion was made of surprise or of the necessity of a continuance, and there is nothing in the record to show that the defendant was injured by the action of the court, it can not be said that there was any abuse of discretion, or error, in permitting the amended bill to be filed. *Koch et al. v. Roth*, 212.

## JURISDICTION.

2. *To construe an instrument creating a trust.* It is one of the well recognized functions of courts of equity, whenever there is any *bona fide* doubt as to the true meaning of an instrument creating a trust, to, at the suit of the trustee brought for that purpose, give a judicial construction to the instrument, and direction to the trustee as to his powers and duties thereunder. *Attorney General v. Newberry Library*, 229.

3. *Waiver of right to question.* Where a court of equity obtains jurisdiction of the parties and the subject matter, it will not pass upon the accounts of the parties by piecemeal; and when the defendant takes issue in respect of claims of indebtedness against him, and answers on the merits, he will waive all right he may have had to question the jurisdiction of the court. *Herrick v. Lynch et al.* 283.

4. *Concurrent—courts of law and equity.* It is a familiar rule that courts of equity have concurrent jurisdiction with courts of law on questions of fraud, and the court which first acquires jurisdiction will retain it until the litigation is finished. *Grand Tower and Cape Girardeau Railroad Co. v. Walton*, 428.

5. *Obtained for one purpose—retained for all purposes.* Where a cross-bill is filed in a suit for the specific performance of a contract to make a deed, and the defendant files his cross-bill charging that the contract was procured by fraud and false promises and representations, this will clothe the court of equity with authority to adjudicate upon these matters; and such court will have the right, if necessary, to do complete justice between the parties, and to settle and determine legal as well as equitable rights. In other words, when equity acquires jurisdiction it will retain the case, and settle all questions incident to the relief sought by the bill. *Ibid.* 428.

## CROSS-BILL.

6. *Whether germane to the original bill.* On bill to foreclose a mortgage, in which a subsequent purchaser of the premises is

**CHANCERY. CROSS-BILL. Continued.**

made a party defendant, a cross-bill by the mortgagor, seeking to have his conveyance to the defendant set aside on the ground of fraud and failure of consideration, is proper, for the purpose of determining who has the right of redemption. *Dawson et al. v. Vickery*, 398.

7. While it is true that a cross-bill must relate to the subject matter of the original bill, it is not essential that the facts showing the relief sought by one defendant against another should appear from the original bill. *Ibid.* 398.

**LACHES.**

8. *Must be pleaded.* A defendant can not assign for error the failure of the court to dismiss a bill on the ground of *laches*, when no such defense has been set up in the court below by plea or answer. *Ibid.* 398.

**SPECIFIC PERFORMANCE.**

9. *Contract for a deed for a right of way—cross-bill charging fraud.* Where a railway company has a valid contract for a deed for its right of way, a court of equity is the appropriate tribunal to decree a deed in pursuance of the contract. And when such relief is sought by an original bill, the land owner may file his cross-bill, charging fraud in procuring the agreement upon which the company seeks a decree of specific performance. *Grand Tower and Cape Girardeau Railroad Co. v. Walton*, 428.

10. Where an agreement to convey a strip of land for a railroad right of way over certain lands, fixing no definite line, was procured to be executed upon the representations and promises of the agents of the road that the road should be located along a definite and fixed line and along the bank of a slough, and after the agreement to release the right of way the promises and representations were disregarded and the road was built on a different route, it was held, that, owing to the fraud practiced by the railway company, a court of equity would not decree specific performance of the agreement, and that a cross-bill setting up fraud was not without equity. *Ibid.* 428.

**PARTIES.**

11. *Attorney General—as representative of the public.* See ATTORNEY GENERAL, 1.

**PRACTICE.**

12. *Preserving the evidence.* See APPEALS AND WRITS OF ERROR, 9.

**SETTING ASIDE FORFEITURE.**

13. *Declared against insane persons.* See INSANE PERSONS, 2, 3.

## CHOOSES IN ACTION.

## ASSIGNMENT.

*Rights of assignee.* See ASSIGNMENT, 2, 3.

## COLLATERAL SECURITIES.

## PAYMENT OF DEBT.

1. *Right of debtor to return of all collaterals.* Where a debtor gives his note, secured by deed of trust, for a debt, as collateral security, and afterward, and as a further security, assigns to the creditor a mortgage given to him on the same premises, covenanting therein that he has the right to make such assignment, such debtor will only be bound to pay the indebtedness for which the collaterals were given, and upon such payment he will be entitled to a surrender of both collaterals. *Gage v. McDermid*, 598.

## CONSIDERATION.

## IN A DEED.

*Recitals subject to explanation.* See CONVEYANCES, 2, 3.

## CONSTITUTIONAL LAW.

## PRODUCTION OF BOOKS AND PAPERS.

*Order of court therefor.* See EVIDENCE, 15 to 18.

## CONTEMPT OF COURT.

## NATURE OF PROCEEDINGS.

*Order to produce books and papers—appeal.* See CRIMINAL LAW, 28 to 32.

## CONTINUANCE.

## MOTION DENIED.

1. *Where not supported by affidavit.* On the contest of an election for the organization of a village, a ballot of a voter was informal, being "Against corporation," instead of "Against village organization under the general law." After this fact was discovered by those contesting, and during the trial, they asked the court to postpone the trial, to enable them to produce the voter to explain his vote, but the application was not based upon any affidavit showing diligence in producing the voter as a witness, or excuse for the want of diligence: *Held*, that the postponement was properly denied. *People ex rel. v. Hanson et al.* 122.

## CONTRACTS.

## CONTRACT OF SALE.

1. *Purchaser to pay indebtedness of vendor—discounting claims—right of vendor to the benefit thereof.* A, failing to succeed in the brewery business, entered into an agreement with B, C and D, by

CONTRACTS. CONTRACT OF SALE. *Continued.*

which a company was to be formed, and the property of A was to be turned over to the company so formed and his debts discharged. Stock was to be issued to the amount of \$9000, of which \$2000 was to be given to A, and he was to be employed by the company. The value of the property turned over by him was \$14,000, or \$9000 over and above a mortgage on the property. The stock received by A represented to him \$2000 of its value. The others did not pay full value for their stock. They received \$7000 in stock, representing \$7000 in value of the property. For this they paid \$7000 of A's debts with only \$1415.27, under a settlement with A's creditors: *Held*, that they could not retain the discount, but must account to A for the same. *Koch et al. v. Roth*, 212.

2. The purchase money agreed to be paid was \$14,000, and after applying the stock issued to A, his remaining indebtedness was \$12,000, being \$5000 due on the mortgage and \$7000 of other debts of A. B and the corporation paid this sum, on settlement with the creditors of A, with \$1415.27: *Held*, that B and the corporation were liable to A for the amount of this discount at which they settled the indebtedness agreed to be paid,—in other words, they were liable to A for the difference between \$7000 and \$1415.27, to-wit, \$2584.73. *Ibid.* 212.

3. *Construed—payment of debts of vendor.* A, the owner of lots having a brewery thereon, sold the real estate to B for \$13,000, and personal property connected with the brewery for \$1000, the price to be paid as follows: \$2000 in shares of stock in a brewery company as soon as organized, and the remainder to be by B applied on the debts of A, including a mortgage of \$5000 on the lots sold. The company was formed and the lots conveyed to the company. A received his stock and applied \$1000 thereof in payment of the personal property and a like sum toward payment of the \$13,000, leaving a remainder of \$12,000. A's debts amounted to \$12,000. There were ninety shares of stock issued in all, of the value of \$9000: *Held*, that the stock issued to A was subject to its proportion of the burden of the incumbrance. *Ibid.* 212.

## OPTION CONTRACT.

4. *Lease, with option to purchase.* A lease of land for one year contained an agreement that upon payment in full of the rent reserved, and the execution of notes and a deed of trust for \$600, in addition to the rents, the lessor would convey the property to the lessee, but imposed no obligation on the latter to purchase: *Held*, that the option thus given was more than a mere offer on the part of the lessor, which he was at liberty to withdraw at any time before acceptance. *McCauley et al. v. Coe et al.* 311.

5. *Consideration.* In such case, the contract embodied in the lease is an entire one, and the same consideration which supports

**CONTRACTS. OPTION CONTRACT. Continued.**

the other provisions of the lease will apply to the option therein given to purchase during the term; and, the lease being under seal, a consideration sufficient to support all its provisions will be presumed. *McCauley et al. v. Coe et al.* 311.

6. *Right to retract the option.* A binding contract for an option for a given time prevents any retraction of the offer during that time. When an option is based upon a sufficient consideration, and is in the nature of a contract, it is only when the period of its continuance is definite that the right to retract is suspended. *Ibid.* 311.

7. *Notice of retraction of the offer.* After the time for electing to purchase under an option has passed, a conveyance by the party giving the option, and his subdividing the property, with other adjoining land owned by him, before acceptance of the offer, being acts inconsistent with the option, are sufficient evidence of a retraction of the offer. So, too, the filing of a bill by him to set aside a deed of trust given by the holder of the contract giving the option, is an act of the same character. *Ibid.* 311.

8. *Withdrawal of the option—not a forfeiture.* The withdrawal of an unaccepted offer to sell land, or the retracting of an option which the other party has not seen fit to exercise, involves none of the elements of a forfeiture. It deprives no party of any right and abrogates no contract, but is merely the exercise of the right by a party to recede from a proposition which the other party has not seen fit to accept. *Ibid.* 311.

**CONSTRUED.**

9. *"Terminal facilities."* A written contract must be given the meaning understood and intended by the parties at the time of its execution, and where the words "terminal facilities," as used in a railroad lease, have a meaning understood by railroad men, it will be presumed that those words were employed by the parties to the contract to be interpreted in accordance with such general understanding by railroad men. *Jacksonville, Louisville and St. Louis Railway Co. v. Louisville and Nashville Railroad Co.* 480.

10. A lease between two railway companies provided for the payment of rent for the use of a part of the track of the lessor company and for terminal facilities. The lessor company switched cars for the lessee company over tracks leading to the shops of a car works company, and sought to recover switching charges therefor, in addition to the amount agreed in the contract to be paid for terminal facilities: *Held.* that the car works track was not a part of the lessor's terminal facilities, and that switching cars over it to and from the shops was a service separate and distinct from the services included in the contract, and that the lessor was entitled

CONTRACTS. CONSTRUED. *Continued.*

to recover the amount such separate service was reasonably worth. *Jacksonville, Louisville and St. Louis Railway Co. v. Louisville and Nashville Railroad Co.* 480.

## CONSTRUCTION.

11. *Rule of interpretation.* The great rule for the interpretation of covenants is, to so expound them as to give effect to the actual intent of the parties, collected, not from a single clause, but from the entire context. The scope and end of every matter are to be considered, and if these be satisfied, then is the matter itself and the intent thereof also satisfied. *Consolidated Coal Co. v. Peers et al.* 344.

12. *Liquidated damages.* If, from the nature of the contract, the damages can not be calculated with any degree of certainty, or if there are peculiar circumstances contemplated by the contract, the stipulated sum will be held to be liquidated damages. *Ibid.* 344.

13. *Whether a lease or mere license.* An instrument under seal which invests the grantee or lessee with the "sole and exclusive right" to mine, and operate in coal, on certain lands, which grant is not limited to any particular vein or stratum, but extends to all coal under said land, and reserves an annual rent or royalty for the coal mined, is not a mere license, but is a lease. A license is an authority to do a particular act or acts upon another man's land without possessing any estate therein. A lease of the right and privilege to mine or take away stone or coal from the lessor's land is the grant of an interest in the land, and not a mere license to take stone or coal. *Ibid.* 344.

## MINING LEASE.

14. *Estoppel to claim a lease is a mere license.* In an action by the lessor of coal land, against the assignee, the declaration averred the making of the lease under seal, whereby the plaintiff leased, set over and assigned to the lessee, for the term of twenty-five years, the sole and exclusive right of mining and operating in coal on the land described; that the lessee, by its deed, granted, bargained, sold, assigned and transferred to the defendant the coal underlying said land, together with all the rights and appurtenances thereunto appertaining, as the same were conveyed or assured by such lease, and thereby covenanted with the defendant that such lessee was seized of a perfect title to the property thereby conveyed, and that the defendant accepted such deed, and took and retained possession of the property conveyed under it, and used and controlled the premises: *Held*, that from these averments the defendant was estopped from setting up the claim that the supposed lease was a mere personal license, and therefore not assignable. *Ibid.* 344.

15. *Construed as to time of payment by the lessee.* A declaration alleged that by the terms of a mining lease the lessee agreed to

FACTS. MINING LEASE. *Continued.*

gin mining coal within twelve months from its date, and to guarantee the lessor a yearly royalty of not less than \$1200 after the expiration of twelve months from the date, and that if, after the expiration of one year, no coal should be mined, the lessee should pay monthly installments of \$100 on its guarantee of \$1200 a year, and said payments should be considered as advanced royalty; and the lessee was to have the right to mine coal sufficient to make the amount of coal mined equal to the amount of royalty paid, provided the royalty should not be less than \$100 per month. The royalty to be paid was three-eighths of a cent per bushel, and it was alleged that such royalty should be paid monthly, on the 20th day of the month, for coal mined the preceding month: *Held*, that the word "royalty" applied not only to the three-eighths of a cent per bushel to accrue from coal actually raised, but also to the monthly payments of \$100 to accrue upon the guaranteed yearly royalty of not less than \$1200. *Consolidated Coal Co. v. Peers et al.* 4.

16. *Royalty—recovery as rent.* A provision in a lease for mining coal, that the lessee or his assigns shall pay a royalty of \$1200 a year, payable monthly, whether any coal is mined or not, is a reasonable one, and may be enforced as liquidated damages. *Ibid.* 344.

## LEASE CONSTRUED.

17. *Extension of term—option to purchase.* See LANDLORD AND TENANT, 1, 2.

## INSANE PERSONS.

18. *Declaring and setting aside forfeitures.* See INSANE PERSONS, 1, 2, 3.

## EVEYANCES.

## CONSTRUCTION OF DEEDS.

1. *Rule of construction—intention.* It may be true that in the construction of deeds courts will incline to interpret the language as a covenant, rather than as a condition; but the intention of the parties to the instrument, when clearly ascertained, must control. *Kew v. Trainor*, 150.

## CONSIDERATION.

2. *Recital in a deed—subject to explanation.* The formal clause in a deed reciting the consideration, is always open to explanation; and such a recital does not waive or destroy the vendor's lien, but is only *prima facie* evidence of payment. The fact of the non-payment of all of the purchase money may be shown, and when such fact appears, a lien may be declared, notwithstanding the formal receipt for the purchase money. *Koch et al. v. Roth*, 212.

3. It is well settled that the recital of the consideration in a deed or bill of sale is not conclusive on either party, and that it

CONVEYANCES. CONSIDERATION. *Continued.*

may be shown by parol what the true amount of the consideration is, and how it is to be paid. *Koch et al. v. Roth*, 212.

## DEED ABSOLUTE IN FORM.

4. *Shown to be a mortgage—by parol evidence.* The law is well settled that a deed absolute on its face may be shown by parol evidence to have been executed to secure the payment of money, when it will be treated, in equity, as a mortgage. *Helbreg et al. v. Schumann et al.* 12.

5. The declarations and statements of the parties made pending the negotiations, and at the time of the final execution of a deed and contract, are admissible to show that the deed was taken as a mortgage or security, and the rule that the terms and conditions of a written contract can not be varied by parol evidence does not apply. *Ibid.* 12.

6. A gave a mortgage on a tract of land owned by him, and afterward sold and conveyed to B the north half of the same, and failing to pay the mortgage or the interest thereon, the administrator of the estate of the mortgagee filed a bill to foreclose the mortgage. An arrangement was then made that B should pay the costs, etc., and \$125 of the debt, and assume payment of the balance due the estate, and A was to convey the south half of the tract to B, who was to mortgage the same to the administrators, and the time of payment was extended, which arrangement was executed, and at the same time B gave to A a contract to reconvey on payment of the mortgage debt and the \$125 advanced: *Held*, that the transaction amounted, in equity, to a mortgage from A to B to secure the latter. *Ibid.* 12.

7. *Debt secured by the deed.* In such case B was bound to pay A's debt in order to protect his own part of the land, and the debt so assumed, and the payment of the costs of the suit, constituted a debt from A, which might properly be secured by mortgage. *Ibid.* 12.

## DELIVERY OF DEED.

8. *Essential, to convey title.* Delivery is indispensable to the validity and operation of a deed. That is the final act on the part of the grantor by which he consummates the purpose of his conveyance, and without it all other formalities which have preceded are impotent to render it effectual as an instrument of title. *Provat et al. v. Harris et al.* 40.

9. *How made.* The law prescribes no formulary to be pursued in making delivery of a deed, and it may be done "by acts without words, or by words without acts, or by both." It may be "either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be by both; but it



CONVEYANCES. DELIVERY OF DEED. *Continued.*

must be made by one or both these ways, for otherwise, though it be never so well sealed and written, it will be of no force." *Provart et al. v. Harris et al.* 40.

10. It is absolutely essential that the acts done or words spoken, or both, shall clearly manifest an intention on the part of the grantor that the deed shall presently become operative to convey the estate therein described, to the grantee, and that he has parted with all dominion and control over it. *Ibid.* 40.

11. *Delivery without actual possession of grantee.* While it may not be essential, in all cases, that the deed shall be delivered into the actual possession of the grantee, it is indispensable that the deed shall pass beyond the dominion and control of the grantor. Until the grantor parts with all control over his deed, that of his grantee does not attach. If the grantor retains control over his deed, it will be ineffectual, for any purpose, as a conveyance. *Ibid.* 40.

12. *Delivery after death of grantor.* So long as a deed is in the hands of a depository, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with the control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. *Ibid.* 40.

13. A man, in his last illness, being desirous of disposing of his property, had a scrivener called in, whom he directed to draw five deeds to five of his sons, and his will. After the making of the deeds the scrivener commenced to write the will, but the grantor being too weary to proceed, he requested the scrivener to call the next morning. The scrivener, as he was leaving, asked the grantor if he should take with him the deeds, who said, "No, let them stay where they are." He said to his pastor, on the day the deeds were drawn, that he wanted to make the deeds for his boys, and that if he did not get better he wanted the pastor to take the deeds and have them recorded. The grantor died before the next morning, leaving the deeds on the table where they were placed by the draftsman: *Held*, that there was no delivery of the deeds to the grantees therein named. *Ibid.* 40.

14. Where a party signing and acknowledging a deed to his two sons is shown to have had a fixed purpose to give his land to them to the exclusion of his daughter, and believed he had accomplished that purpose by such deed, yet if he did not deliver the same in his lifetime, or intend it to take immediate effect without delivery, it will be void, and pass no title. *Benson et al. v. Hall et al.* 60.

15. A father had made a deed of land to his two sons, and placed the same in the hands of his wife, and the day before his death he

**CONVEYANCES. DELIVERY OF DEED. Continued.**

had his wife bring him the deed, and he then gave the same to one of his sons, stating that was for him and his brother: *Held*, that these facts showed the delivery of the deed. *Benson et al. v. Hall et al.* 60.

**CORPORATIONS.****NOTICE.**

1. *To managing officer.* Notice to the head officer or managing agent of a corporation may usually be regarded as notice to the corporation itself. *Koch et al. v. Roth*, 212.

**INDIVIDUALS ACTING AS A CORPORATION.**

2. *Limiting their liability—assuming perpetuity.* An association or number of persons in the business of insurance, by professedly limiting their liability to the amount of money contributed by each, and assuming to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives, will thereby act as a corporation, and will be liable to judgment of ouster. And the fact that such persons may be held individually liable upon policies of insurance which they may have issued, will not relieve them of the charge of having acted as a corporation. *Greene et al. v. People ex rel.* 513.

**NOTICE OF LIEN.**

3. *Signed by attorney—not under seal.* See **LIENS**, 13.

**INSOLVENT.**

4. *Preferring creditors—misapplying funds.* See **INSOLVENT DEBTORS**, 6, 7.

**COUNTY BOARD.****REVIEWING ASSESSMENT.**

*Effect of illegal acts.* See **TAXATION AND TAX TITLES**, 1 to 4.

**CROSS-ERRORS.****NOT ASSIGNED.**

*Will not be considered.* See **PRACTICE IN THE SUPREME COURT**, 4.

**CRIMINAL LAW.****EVIDENCE IN CRIMINAL CASES.**

1. *Letters written by defendant and found in his possession.* On the trial of a man for the murder of a young woman by poison, letters found in his possession, addressed to the deceased and shown to be in the handwriting of the defendant, tending to prove the relations existing between them, and thus tending to prove the

NAL LAW. EVIDENCE IN CRIMINAL CASES. *Continued.*

ative, are admissible in evidence against the defendant without rec<sup>t</sup> proof that the letters had been delivered to the deceased. *mons v. People*, 66.

2. *What are dying declarations.* Dying declarations are such as a made relating to the facts of an injury of which the person asking them afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance, and without hope of escaping the impending danger. *Ibid.* 66.

3. About twenty-five minutes before the death of a woman from poison, she stated to her sister that the defendant, to whom she was engaged to be married, had given her a capsule to bring back her monthly courses; that she gave way to this man. Before these declarations, in speaking to her two sisters about the capsule, she stated, "I believe it will kill me." Before making this statement she threw up her arms and said to one of her sisters, "Don't leave me any more." When the declarations were made her mind seemed to be perfectly clear, and one convulsion had followed another for over an hour, each with increased severity: *Held*, that the statements of the deceased were properly admitted in evidence against the defendant as dying declarations. *Ibid.* 66.

4. *Proof of conviction of infamous crime—parol evidence.* The judgment of the court where the conviction of a defendant is had, is the only competent evidence to establish the conviction, and that judgment can only be established by producing the record of the judgment, or an authenticated copy of the record. It can not be shown by parol evidence, if objection to such evidence is made when offered. *Ibid.* 66.

5. *Qualification of witness—former conviction of perjury.* The fact that a defendant in a criminal prosecution may have been convicted of perjury in another State will not disqualify him as a witness. His conviction can only be shown for the purpose of affecting his credibility. For that purpose his conviction may be shown by the record, but not by parol, if objection is made to proof of the fact by parol. *Ibid.* 66.

6. *Witness not named on indictment.* It is not error to allow a witness to testify in a criminal case whose name is not on the indictment, and when no notice has been given that the witness would be called. It is a matter resting in the sound discretion of the court. *Ibid.* 66.

7. *Proof necessary to conviction.* The proof of the charge in criminal cases involves the proof of two distinct propositions: First, that the act itself was done; and secondly, that it was done by the person charged, and by none other,—in other words, proof

**CRIMINAL LAW. EVIDENCE IN CRIMINAL CASES. Continued.**

of the *corpus delicti*, and of the identity of the prisoner. *Carlton v. People*, 181.

8. *Circumstantial evidence—its sufficiency.* What circumstances amount to proof of an offense can never be matter of general definition. The test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt. *Ibid.* 181.

9. In order to warrant a conviction of crime on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged. *Ibid.* 181.

10. Among the circumstances which may be judicially considered as leading to important and well-grounded presumptions, are motives to crime, declarations or acts indicative of guilty consciousness, or intentions and preparations for the commission of crime. *Ibid.* 181.

11. *Circumstantial evidence—instruction condemned.* At the trial of a criminal case the court refused an instruction asked by the defendant, which was as follows: "The jury are instructed, as matter of law, that where a conviction for a criminal offense is sought on circumstantial evidence alone, the People must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely inconsistent, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any other theory than that of the guilt of the accused; and in this case, if all the facts and circumstances relied on by the People to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, they should acquit him:" *Held*, properly refused, as being too broad and sweeping in its terms. *Ibid.* 181.

12. *Degree of proof required.* The jury should be satisfied of the defendant's guilt beyond a reasonable doubt, and if there be no probable hypothesis of guilt consistent with the facts of the case, the defendant must be acquitted. *Ibid.* 181.

13. *Alibi—burden of proof.* The burden of proof of an alibi in a criminal case is upon the accused, and in order to maintain that defense he is bound to show, in its support, such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him. *Ibid.* 181.

CRIMINAL LAW. EVIDENCE IN CRIMINAL CASES. *Continued.*

14. *Creating a reasonable doubt.* The reasonable doubt which will acquit a prisoner when his defense is an *alibi*, is the doubt of guilt which arises from a consideration by the jury of all the evidence, as well that touching the question of the *alibi* as the criminating evidence introduced by the prosecution. *Carlton v. People*, 181.

15. *Arson—of the proof necessary.* On an indictment for arson it is necessary for the People to prove that the building described was burned by the accused, and that such burning was done with felonious intent, or, in the language of the statute, "willfully and maliciously." *Ibid.* 181.

16. In arson, the main fact required to be proved, in the first place, is the burning of the building, and when that is shown, then it is necessary to show how the act was done, and by whom, in order to convict the accused. When the general fact is thus proved, a foundation is laid for the introduction of any legal and sufficient evidence that the act was committed by the accused, and that it was done with a criminal intent. Such evidence need not be direct and positive, but may be circumstantial in its character. *Ibid.* 181.

17. *Admissible evidence—foot-prints.* On the trial of one for arson in the burning of a barn, evidence of the foot-prints near the barn, or leading to and from it, and their correspondence with the defendant's feet, is competent; and though not, by itself, of any independent strength, it is admissible with other proof, as tending to make out a case. *Ibid.* 181.

18. *Admissions and threats of a third person.* On the trial of one for the burning of a barn, the defendant offered to prove by witnesses that they had heard a third person make threats that he would burn up everything the prosecutor had, which was not admitted: *Held*, that the proposed testimony was mere hearsay, and was properly excluded. *Ibid.* 181.

19. It is competent for the accused to show, by any legal evidence, that another committed the crime charged to him, and that he had no participation in it. But this can not be shown by the admissions or confessions of a third person not under oath, which are only hearsay. The proof must connect such third person with the fact,—that is, with the perpetration of some deed entering into the crime itself. There must be proof of such a train of circumstances as tend clearly to point to him, rather than to the prisoner, as the guilty party. *Ibid.* 181.

## REASONABLE DOUBT.

20. *Explained.* While a reasonable doubt is difficult to define accurately, all the authorities agree that such a doubt must be actual and substantial, as contradistinguished from a mere vague

CRIMINAL LAW. REASONABLE DOUBT. *Continued.*

apprehension, and must arise out of the evidence. The jury may be said to have a reasonable doubt when, after the entire comparison and consideration of all the evidence, they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge. *Carlton v. People*, 181.

21. Proof "beyond a reasonable doubt" is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. The two phrases, "proof beyond a reasonable doubt," and "proof to a moral certainty," are synonymous and equivalent. Each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfy them as to leave no other reasonable conclusion possible. *Ibid.* 181.

22. *Doubt must be as to the guilt of the accused.* On the trial of one for arson, the court instructed the jury that "the reasonable doubt the jury are permitted to entertain, must be as to the guilt of the accused on the whole of the evidence, and not to any particular fact in the case:" *Held*, that the instruction was not erroneous. *Ibid.* 181.

## PROOF OF VENUE.

23. Without proof that the offense was committed in the county alleged in the indictment, a judgment of conviction will be reversed. *Moore v. People*, 405.

24. Where an indictment charges the commission of a rape in Madison county, proof that it was committed in Upper Alton, without showing in what county or State Upper Alton is situated, is not sufficient to warrant a conviction. *Ibid.* 405.

25. In a criminal prosecution it devolves upon the People to prove every material allegation of the indictment, and the charge that the crime was committed in a particular county is a material averment, and unless proved, no conviction can be had. *Ibid.* 405.

## VARIANCE.

26. *When averments must be proved as charged.* Where allegations are made, if they be such as to enter substantially into the description of the crime, so that they can not be severed from it without rendering the description applicable to another and different offense, (different in fact, if not in nature,) then each allegation must be proved, or the indictment is not sustained. *Bromley v. People*, 297.

## CONTEMPT OF COURT.

27. *In what name proceedings should be carried on.* In a proceeding for a criminal contempt, the general practice is to carry

# **CIVIL LAW. CONTEMPT OF COURT. Continued.**

the prosecution in the name of the People; but where the proceeding is really an incident of the principal suit, and is brought to advance the interest of a party, the practice seems to be to enter and file the papers in the original cause. *Lester v. People*, 408.

*Nature of the proceeding.* Where the contempt consists of anything done or omitted, in the presence of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing any act injurious to a party protected by the order of the court which has been forbidden by its order, the proceeding is punitive, the penalty is inflicted by way of punishment for the wrongful act, and to vindicate the authority and dignity of the People, as represented in and by their judicial tribunals. *Ibid.* 408.

10. In such cases, although the application for the attachment, when necessary to be made, may be made and filed in the original case, the contempt proceeding will be a distinct case, criminal in nature, and may properly be docketed and carried on as such, and the judgment entered therein will exhaust the power of the court to further punish for the same act and offense. *Ibid.* 408.

11. *When not a criminal proceeding—appeal.* Cases of that character are distinguishable from cases where a party to a civil suit, by using the power to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order from the court commanding it to be done, and upon refusal, the court, in way of execution of its order, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. The proceeding in the latter case is a civil one, and an appeal lies from the final order, as in other civil cases. *Ibid.* 408.

12. The mere entitling of the cause will not change the nature or character of the proceeding, and render that criminal which is otherwise a civil proceeding. So much of the record as may be necessary to show the order upon which the alleged contempt is based, and the proceedings had in respect thereof, if properly incorporated in the record, will be brought up by appeal from the order in the contempt proceeding, and may be considered on such appeal. *Ibid.* 408.

32. A proceeding against a party to a civil action to punish him for refusing to comply with an order to produce his books of account for the inspection of the adverse party, and to enable him to take copies from the entries therein to enable him to prepare his case for trial, is a mere civil remedy, and not criminal. *Ibid.* 408.

33. *Disobedience of unauthorized order.* The court has no power to require a defendant to place his books in the hands of the clerk,

CRIMINAL LAW. CONTEMPT OF COURT. *Continued.*

there to remain indefinitely, with leave to the plaintiff to make copies of the entries therein, not for the purpose of being then used in evidence under the direction of the court, but for the purpose of enabling the plaintiff to prepare his case, and disobedience of such an order will not render him liable for an attachment for a contempt. *Leater v. People*, 408.

34. *Disobedience to erroneous order of court—appeal.* As a general rule, mere errors in making interlocutory orders will furnish no justification for refusing to obey the same, when they do not subject the party to the payment of money or to imprisonment. If the party against whom such order is made wishes to contest the validity or propriety of the order, he may refuse to obey, and in the further proceeding for contempt he may show in defense that the court had no authority to make the order, and if his defense is disallowed, and judgment is entered against him for a sum of money by way of fine, enforceable by execution or imprisonment, an appeal in his favor will lie. *Ibid.* 408.

## OF THE INDICTMENT.

35. *Charging distinct offenses in one indictment.* In cases of felony, where two or more distinct offenses are charged in the same indictment, it may be quashed, or the prosecutor compelled to elect on which charge he will proceed. But such election will not be required where several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offense. *Kotter v. People*, 441.

36. There can be only one transaction embraced in a single indictment for felony, and the only mode of objecting to a joinder of offenses, in case of felony, is by an application to the court to quash the indictment before plea, or to compel the prosecutor to elect which charge he will try. *Ibid.* 441.

37. The defendant moved to quash an indictment charging him with the forgery of three receipts of three different persons, but did not make any formal motion to compel the prosecutor to elect for which forgery he would prosecute, which the court overruled: *Held*, the court erred in overruling the motion to quash. *Ibid.* 441.

## BURGLARY.

38. *Defined.* Burglary, at the common law, is where a person breaks and enters any dwelling house by night, with intent to commit a felony therein, whether such felonious intent be executed or not. But under our statute burglary may be committed by day as well as by night. *Bromley v. People*, 297.

39. *Sufficiency of indictment for burglary.* Under section 408 of the Criminal Code, and section 36 of the same code, as amended in 1885, it is unnecessary to charge in an indictment that the crime



CRIMINAL LAW. BURGLARY. *Continued.*

was committed either "in the night time" or "in the day time," in order to constitute a charge of burglary under the existing law of this State. An indictment which fails to allege the crime was committed either by day or by night, would clearly be a good charge of burglary committed in the day time. *Bromley v. People*, 297.

40. Where a burglary is not alleged to have been committed in the night time, it would seem that only the punishment provided for burglary in the least aggravated degree can be imposed. *Ibid.* 297.

41. *Degrees in punishment.* Under our statute, burglary committed in the day time, or in respect to a building not a dwelling house, is punishable by imprisonment for not less than one nor more than twenty years. If, however, the offense is committed in the night time, and in respect to a dwelling house, then the minimum punishment is five years; and if the burglary of a dwelling house is in the night time, and the burglar has a deadly weapon, a deadly drug or an anæsthetic upon his person or in his possession, then not only is the minimum imprisonment five years, but there is no limit to the maximum term of imprisonment. *Ibid.* 297.

42. *Proof of burglary as charged.* Where the time laid in an indictment is material, then it must be specifically proved as set out in the indictment. And it is also a general rule that all descriptive averments in an indictment must be proved as laid. So a charge of burglary in the night time is not sustained by proof of a burglary committed in the day time, and it is error to admit in evidence proof of a burglary in the day time. *Ibid.* 297.

## FORGERY.

43. *Intent to damage and defraud.* On the trial of one for the forgery of receipts, the court, on behalf of the People, instructed the jury, that while it was necessary that the defendant should have forged the receipts with the intent to damage and defraud the persons whose names were signed thereto, yet if they found that the defendant forged the receipts, or either of them, then the law would presume that defendant intended to damage and defraud such persons: *Held*, that it was error to give the instruction. *Kotter v. People*, 441.

44. On the trial of one for the forgery of three receipts for fees due from him to his witnesses, where it was claimed that the witnesses had agreed to give him their fees, the court instructed the jury as follows: "Even though you may believe that all three of the parties (witnesses) mentioned in the indictment did agree to give their witness fees to the defendant, still this would not authorize the defendant to sign and forge their names, or either of them, as charged; \* \* \* and if you find, beyond a reasonable

CRIMINAL LAW. FORGERY. *Continued.*

doubt, that the defendant did forge the names of the said parties, or either of them, as charged, you should find the defendant guilty:" *Held*, that the instruction was erroneous. *Kotler v. People*, 441.

45. Where a party, acting under the honest belief that certain witnesses have given him their fees due from him, signs the names of such witnesses to a receipt written on a fee bill, and believes that he has the right to sign their names, and has no intention to defraud such witnesses, he will not be guilty of forgery. *Ibid.* 441.

46. *Rebutting presumption of intent to defraud.* While an intent to damage and defraud is essential to the crime of forgery, such intent is not an irrebuttable presumption of law, but is an open question of fact for a jury, to be determined from the facts and circumstances shown by the evidence. The presumption of an intent to defraud, from the signing of the name of another, may be overcome by the other circumstances of the case. *Ibid.* 441.

## DEDICATION.

## PLAT.

1. *By person not the owner.* In 1854 the husband of the owner of land made a plat thereof into blocks and lots, as an addition to a city, which plat showed a block without numbers, which was not divided into lots as were the other blocks, and upon the face of which were the words "Public Square," and the plat was recorded: *Held*, that there was no effectual dedication of the square by reason of the execution and recording of the plat. *Elson et al. v. Comstock*, 303.

2. A dedication of property for public use is in the nature of a conveyance for the purposes of the use, but a person can convey or donate no more or greater estate than he holds. If he has no title, or his title is conditional, and it fails, the dedication also will fail. *Ibid.* 303.

3. *Vesting title in the village—rights of lot owners.* Whatever right the public may have to the use of a block marked in the plat of an addition as a public square, will, on the incorporation of the village in which it lies, vest in such village, as the representative of the public; and whatever easements or privileges the purchasers of lots in the addition are entitled to claim in such square as appurtenant to their lots, must be regarded as belonging to them as a part of the village so incorporated. *Ibid.* 303.

## DEEDS.

## ABSOLUTE IN FORM.

1. *Construed as a mortgage.* See CONVEYANCES, 4 to 7.

## DELIVERY OF DEED.

2. *How made—necessary to convey title.* Same title, 8 to 15.

## DOWER.

## ASSIGNMENT.

1. *Right to rents—before assignment of dower.* A surviving wife or husband is not entitled to rents and profits as damages for non-assignment of dower, which have accrued prior to his or her demand for dower and a refusal to assign the same. But the commencement of suit for dower is treated as a demand therefor. *Rawson v. Corbett et al.* 466.

2. *Guardian can not assign dower to himself.* Even if the general rule were that a guardian may assign dower for his wards, yet reasons of public policy and public morality would alike preclude the idea that, where one and the same person is both the owner of the dower and the guardian of the infant heirs, he may lawfully assign dower, as such guardian, to himself, as the holder of the dower right, or make an agreement, in his trust capacity, with himself, acting in his own interest, to give to himself, in lieu of that which he is authorized to demand,—an assignment of common right,—something else that he is not authorized to demand except under certain contingencies, which must be found to exist by a court of competent jurisdiction. *Ibid.* 466.

3. It would be absurd for a person to make a demand upon himself, and then refuse to comply with such demand; and it seems monstrous that one acting in his own behalf, as the owner of a right of dower, may make a demand upon himself, as the guardian and trustee of the infant heirs, etc., and by simply refusing or neglecting to comply with such demand, make such infant heirs, his own wards, liable to pay him damages. *Ibid.* 466.

4. *By infant heir—former decisions—obiter dictum.* The opinion of the court in *Lenfers v. Henke*, 73 Ill. 405, in so far as it states that at common law an infant heir may assign dower, is *obiter dictum*. *Ibid.* 466.

## COAL MINES.

5. *Right to open and operate—waste.* It is a well established rule of law, that a person occupying land as dower, can not commit waste upon such land, and that the opening of coal or other mines thereon amounts to waste, but it is equally well settled in this State, that when mines are already opened upon land assigned as dower, the widow has the right to operate the same and receive the proceeds thereof. *Priddy et al. v. Griffith et al.* 560.

6. A widow may be endowed of mines opened by the heir or owner of the fee after her dower attaches, and before there has been any assignment. It is not waste for her to work mines opened, although the same have been abandoned before the death of her husband. She may construct new approaches and not be guilty of waste. *Ibid.* 560.

**DOWER. COAL MINES. Continued.**

7. *Contract for opening mines—rents and royalties.* Where there is a valid, subsisting contract, executed by the husband in his lifetime, under which the lessees may open the mines, and by the terms of which one dollar per acre rent or royalty is to be paid annually to the lessor, his heirs or other legal representatives who, at the time, shall be legally entitled to the life estate in or fee simple title to the land until the mines are opened, and certain fixed royalties after the mines are opened and worked, the widow of the lessor will be entitled to the rent or royalty upon lands assigned as dower, after the assignment of her dower. *Priddy et al. v. Griffith et al.* 560.

8. Should the lessees open mines upon lands assigned as dower, without the consent of the widow, she will be entitled to the royalty named in the lease. In such case, the act of opening the mine would be practically the act of the husband, viz., authorized by him. *Ibid.* 560.

9. A lease of coal lands for mining purposes, after fixing the royalty to be paid for coal raised, provided that until actual mining operations were commenced, the lessee, or its successor or assigns, should, on the first day of January, pay the lessor, or those succeeding to his rights, one dollar for each acre of the tract leased out of which no coal at that time should be raised: *Held*, that the widow of the lessor was entitled to the one dollar per acre after the assignment of her dower, until the opening of the mines, if any were opened on her lands, after which she should receive the royalties mentioned in the lease, and that the one dollar per acre was to be treated as the annual rental for lands, and not mines. *Ibid.* 560.

**DRAINAGE LAW.****DRAINAGE DISTRICT.**

1. *May include a village.* A drainage district organized under the Farm Drainage act may include within its limits a part of the territory of a village already organized under the general law relating to cities and villages. *People ex rel. v. Nibbe et al.* 269.

2. It can not be doubted that the legislature has the power to authorize the organization of municipal corporations for one purpose, embracing territory situated wholly or partly within the boundaries of another municipal corporation already organized for another purpose. *Ibid.* 269.

3. Section 11 and subsequent sections of the Farm Drainage act, which provide for the formation of districts for combined drainage out of territory lying within a single town, merely provide that the territory to be embraced in the proposed district shall lie

DRAINAGE LAW. DRAINAGE DISTRICT. *Continued.*

within one town. Those sections are sufficiently broad to embrace any and all contiguous territory within a town which is so circumstanced as to require a combined system of drainage for agricultural or sanitary purposes, irrespective of whether any portion of it is already included within the boundaries of a pre-existing municipal corporation or not. *People ex rel. v. Nibbe et al.* 269.

## EJECTMENT.

## HOW CREATED.

*Oral license—revocation.* See NUISANCE, 4.

## EJECTMENT.

## RIGHT OF ACTION.

1. *Legal title and right to possession, essential to recovery.* The general rule is, that in ejectment the legal title must prevail. But such is not always the case. The landlord, though the owner of the fee, can not recover against his tenant occupying under a lease, where there has been no forfeiture of the conditions of the lease. *Sands et al. v. Kagey*, 109.

2. So an assignee of a note secured by mortgage, in possession of the mortgaged premises, can not be turned out of possession in an action of ejectment brought by the mortgagee. An ejectment can not be maintained against an occupant of real estate so long as he is lawfully in possession, nor can the holder of the legal title recover if the legal right to the possession is in another. *Ibid.* 109.

3. The action of ejectment proceeds for the possession of the premises, claiming that they have been unlawfully entered into and unjustly withheld. Facts which go to disprove these make a legal defense. *Ibid.* 109.

4. It has been held that where a party has entered into possession under a contract of purchase, made valuable improvements, paid taxes, exercised acts of ownership over the property and paid the amount contracted to be paid, these are facts which may be proven, and amount to a defense in an action of ejectment brought by the vendor against the vendee. *Ibid.* 109.

5. In 1854 the owner of a tract of land gave a bond to a railway company for the conveyance of a strip for a right of way as soon as the line of the road should be located, and authorizing the company to enter and occupy. In 1872 the railway company took possession of the land without any objection by the owner of the legal title, and complied with its contract, and used the right of way up to 1891, when a grantee of the original owner brought ejectment: *Held*, that the plaintiff could not recover. *Ibid.* 109.

EJECTMENT. *Continued.*

## POSSESSION.

6. *Notice of equities.* The possession by a railway company of its right of way, by operating its trains over the same, is notice to the world of the title or equities held by such company. *Sands et al. v. Kagey*, 109.

## LACHES.

7. *Who may not complain.* A railway company, eighteen years after the date of a bond by a land owner to convey it a right of way, took possession and constructed its track, etc., without objection by the obligor of the bond, who was still the owner of the land: *Held*, that a grantee of the owner could not set up and rely on the *laches* of the railway company, as he had no right until long after the company entered into possession. *Ibid.* 109.

## ELECTIONS.

## FORM OF BALLOT.

1. *For the organization of a village.* A ballot cast at an election to organize certain territory as a village, which reads, "Against corporation," can not be counted on the question of incorporation. The ballots should be "For village organization under the general law," or "Against village organization under the general law," as required by the statute. *People ex rel. v. Hanson et al.* 122.

## EMINENT DOMAIN.

## SPECIAL BENEFITS.

1. *What constitutes.* If property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to a greater or less degree, be likewise specially benefited. In other words, it is not such benefits as are special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value,—that is, specially benefited,—that are to be considered. *Metropolitan West Side Elevated Railway Co. v. Stickney et al.* 362.

2. In a condemnation proceeding the court instructed the jury, that though they believe, from the evidence, that some of the property of some of the respondents "will actually be benefited by reason of the construction and operation of the petitioner's railroad, yet if the jury further believe, from the evidence, that such benefits are not special to the respondents' property, and are shared by it in common with the generality of property in the vicinity of the line of said proposed railroad, then such benefits are not to be

INENT DOMAIN. SPECIAL BENEFITS. *Continued.*

considered in determining whether or not the property of said respondents not taken will be damaged by reason of taking a part of their property and operating and maintaining the petitioner's railroad : " Held, that the instruction did not announce a correct rule of law, and was erroneous. *Metropolitan West Side Elevated Railway Co. v. Stickney et al.* 362.

3. If a piece of property is enhanced in value, its enhancement, or, in other words, benefits to the property, can not be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. *Ibid.* 362.

4. It follows that where the benefits are designated as "general benefits," "benefits common to other property," and the like expressions to be found in the decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits upon properties near it by an increase in their value, and at the same time, by the convenience afforded the general public, confer a general benefit. *Ibid.* 362.

5. So a railroad built through a town or through the country may be a general benefit by affording additional facilities for travel and commerce, and thereby be of benefit to the community at large; but the effect of such general benefits upon any particular piece of property would be impossible of ascertainment, and speculative, and it has always been held that such benefits are not to be considered for that reason. *Ibid.* 362.

6. Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. On the one hand, the damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land, and such as are capable of measurement and computation. Hence, all imaginary and merely speculative damages or benefits are excluded from consideration. *Ibid.* 362.

7. *To land not taken.* The damage contemplated by the constitution is an actual diminution of the present value or price caused by the construction of the road, or a physical injury to the property that renders it less valuable in the market if offered for sale. The test of whether damages have accrued to the land not taken, is, whether there has been a diminution in the market value of the land by reason of the proposed improvement. The effect upon the whole tract remaining after part is taken must be considered. *Ibid.* 362.

**EMINENT DOMAIN. SPECIAL BENEFITS. Continued.**

8. The consideration of benefits by which the land not taken is increased instead of being diminished in value, is not the deduction of benefits or advantages from the damages, but it is ascertaining whether there is damage or not. It is but the estimation of damages, and seems to be the only fair and just mode of estimating them. *Metropolitan West Side Elevated Railway Co. v. Stickney et al.* 362.

9. If the property is worth as much after an improvement as before, then there is no damage done the same. If the benefits received from the making of the improvement are equal to or greater than the loss, then the property is not damaged for public use. There can be no damage to property without pecuniary loss. If there is no depreciation in value there is no damage. *Ibid.* 362.

10. The damages to property not taken must be real, and not speculative, and it must depreciate the price, or its use; and the depreciation is to be determined by comparing its value before and after the structure is made which produces the injury. Any benefits thus conferred should be considered, as well as injury inflicted by the structure, in estimating the damages. *Ibid.* 362.

11. The measure of damages to property not taken is the difference in value of the land before the proposed construction, and what it will be afterward. Hence, the effects flowing from the proposed work upon the particular property are to be considered, and if the value of the land not taken, considered as a whole tract, or separately, is equal to its value before the improvement, there is no damage to property not taken. *Ibid.* 362.

12. The consideration of such benefits as tend specifically to enhance the value of the particular property is not setting off benefits against the damages to the property, but is the simple ascertainment of whether the land has been depreciated in price or worth,—that is, whether loss or damage has resulted to the owner. The fact that other property in the vicinity is likewise increased in value from the same cause, furnishes no reason for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not. *Ibid.* 362.

13. There can be no damage to property without pecuniary loss, or injury which lessens its value. It therefore follows that every element arising from the construction and operation of the railroad, or other public improvement, which, in an appreciable degree, capable of ascertainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it. *Ibid.* 362.



NENT DOMAIN. SPECIAL BENEFITS. *Continued.*

14. The situation of the property, the use to which it is devoted and of which it is susceptible, the character and extent of the business to which it is adapted before and after the construction of the public work, and, indeed, every fact and circumstance legitimately tending to show a depreciation or increase of the value of the property, are proper to be considered, so far as they tend to show the actual value of the land with and without the proposed taking for the public use. *Metropolitan West Side Elevated Railway Co. v. Stickney et al.* 362.

15. On the other hand, a consideration of facts and circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which, in determining the injury or benefit to the particular tract of land, can not be other than conjectural or speculative, should be excluded. *Ibid.* 362.

16. *Former decisions as to damages and benefits.* In *St. Louis, Indianapolis and Springfield Railroad Co. v. Kirby*, 104 Ill. 347, an instruction was approved which excluded the consideration of any general benefit to the land occupied as a farm which a railroad might be in making a better market or convenience in travel. By approving such instruction it was not intended by this court to exclude such benefits as would appreciate the market value of the particular tract of land. *Ibid.* 362.

17. In *McReynolds v. Burlington and Ohio River Railway Co.* 106 Ill. 152, the jury were instructed, that if by the construction of the railroad the land would be specially benefited to the extent, or greater than, they would be damaged, then the jury should only find a verdict for the compensation for the land actually taken, which the court approved: *Held*, that the ruling was in harmony with the prior decisions of this court except the case of *Keithsburg and Eastern Railroad Co. v. Henry*, 79 Ill. 294. *Ibid.* 362.

18. In the *McReynolds case* this court used the words, "benefits common to other property," as designating those benefits which flow to the public generally, as distinguished from those which enhance the value of the specific property, without intending to exclude any elements arising from the improvement that tended to specifically enhance the value of the particular property. *Ibid.* 362.

19. In *Chicago and Evanston Railroad Co. v. Blake*, 116 Ill. 163, the words in an instruction, "under the laws of this State no benefits or advantage which may accrue to lands or property in common with all other property along the line of the proposed railroad," by reason of its construction and operation, can lawfully be set off,

# EMINENT DOMAIN. SPECIAL BENEFITS. *Continued.*

etc., was understood to mean those benefits of a general nature which each tract of land or parcel of property along the line of the railway shared in common by reason of increased facilities for traffic and commerce, and the like, and which, while resulting in benefit to the community at large, are incapable of measurement when applied to a particular tract of land. *Metropolitan West Side Elevated Railway Co. v. Stickney et al.* 362.

20. In *Harwood v. Bloomington*, 124 Ill. 48, this court held, that when the land owner interposes a claim for damages to that part of the land not taken, in consequence of the improvement, if the land not taken has received special benefits,—benefits not common to other property,—such benefits may be considered in arriving at the amount of damages the owner may have sustained to the property not taken. The court was not called upon to define what benefits were “common to other property,” and did not attempt to do so. The sense, however, in which the words were used in the opinion, is clearly indicated in the cases therein cited. *Ibid.* 362.

21. The rule laid down in *Keithsburg and Eastern Railroad Co. v. Henry*, 79 Ill. 294, that the question of benefits can in no case be considered in estimating the value of land taken or in estimating the damages to land not taken, is not supported by any of the prior or subsequent cases. *Ibid.* 362.

## DAMAGES AND BENEFITS.

22. *Compensation for damage to property not taken.* The provision in section 13, article 2, of the constitution, which prohibits the damaging of private property for a public use without making just compensation, is equally mandatory with that against taking private property for public use without making just compensation, and renders unlawful every such damaging unless the compensation be fixed and ascertained by a jury. And ample provision must be made by law, so that the owner shall receive payment of compensation without unreasonable and vexatious delay. *Leopold et al. v. City of Chicago*, 568.

23. *Set-off of benefits.* No supposed benefits to the property not taken can be set off against the compensation to be paid for the land actually taken, but in respect of damages to land not taken, special benefits to the property damaged may be set off against the damages accruing to the property. *Ibid.* 568.

24. *Payment of damages by benefits—assessing land twice for benefits.* Where benefits are set off against damages to the part of the land not taken, in a proceeding to condemn for a street, an attempt to raise money to pay for the property taken or damaged, by the assessment of special benefits on the same land, under section 23 of article 9 of the City and Village act, and thus require

**EMINENT DOMAIN. DAMAGES AND BENEFITS. Continued.**

the owner to pay the benefits twice, is in palpable violation of the constitution. *Leopold et al. v. City of Chicago*, 568.

25. The recovery of the special benefits in a condemnation proceeding will estop the city from again imposing the same, by way of special assessment, upon the same property. The land owner can not be required to twice pay the special benefits to his property. *Ibid.* 568.

26. *Supplemental proceeding—relitigation of damages to property not taken.* A judgment in a proceeding by a city to condemn a part of a lot for a street is final and conclusive upon the parties as to the compensation to be paid for the part taken, and damages to the residue; and upon a supplementary proceeding to raise money to pay such compensation, the question of damages to the lot not taken, and fair and just compensation for the part taken, can not be relitigated. *Ibid.* 568.

**CONFIRMATION PROCEEDINGS.**

27. *Matters to be considered.* The issue to be tried in the proceeding for the confirmation of the assessment, precludes the idea that damages to the lot owner by reason of the taking of a portion of his property are to be considered. The commissioners appointed to spread the assessment are required, simply, to deal with the lot as they find it, the damages from the taking having, in theory, at least, been determined in the condemnation proceeding. *Ibid.* 568.

**NATURE OF PROCEEDINGS.**

28. *At law or in equity.* Where a railroad company is authorized to take private property for a public use under its charter, the mode of procedure is laid down in our statute entitled "Eminent Domain." The proceeding is one at law, and not in equity. *Grand Tower and Cape Girardeau Railroad Co. v. Walton*, 428.

29. *Ascertaining damages—under a cross-bill.* While it may be true that a court of equity has no jurisdiction to determine the compensation to be paid for lands proposed to be taken for railroad purposes where a bill is filed for that purpose alone, yet where the land owner has been brought into a court of equity by a railroad company after it has taken and appropriated the lands for its purposes, and it prays for a decree requiring the land owner to convey the lands thus taken, the latter may insist upon being paid for the land taken and damaged, and ask the court, by cross-bill, to have the amount ascertained and determined by a jury to be selected for that purpose. *Ibid.* 428.

**EQUITABLE ASSIGNMENT.****CHOSES IN ACTION.**

*Rights of assignee.* See ASSIGNMENT, 1, 2, 3.

## EVIDENCE.

## DISCRETION IN ADMITTING.

1. *Out of its proper order.* The trial court may, in its discretion, allow evidence in rebuttal which strictly should have been offered in chief. *Simons v. People*, 66.

## ERRONEOUSLY ADMITTED.

2. *Excluding evidence after its admission.* While it is true a court has no right to admit improper evidence, yet when that has been inadvertently done, and the court, as soon as the mistake is discovered, promptly rules out the evidence, a judgment ought not, as a general rule, to be reversed for such an error. *Ibid.* 66.

3. *Held not prejudicial.* In an action upon notes and checks made in the name of Bennett Jacobson, where the controversy on the trial was whether Jacob and Morris Jacobson were authorized to execute the notes and checks, a witness was asked, "Do you know of any notes signed by Jacob, in defendant's name, that were paid by defendant?" The answer was: "Not that I know of. I know of such checks drawn on Bennett's bank at Grand Lodge, which were paid." The suit was abandoned as to the checks: *Held*, that the answer in no way prejudiced the defendant. *Jacobson v. Gunzburg*, 135.

4. In the same case a witness was asked, "Do you know whether Jacob Jacobson had authority to sign Bennett Jacobson's name to commercial paper?" *Held*, that while it might have been better if the question had been confined to the notes and checks, yet there was no substantial error, as the form of the question could do the defendant no injury. *Ibid.* 135.

## ACTION ON LOST NOTE.

5. *Allegation of destruction of note—degree of proof required.* In an action of assumpsit upon a destroyed or lost promissory note, the defendant asked the court to instruct the jury that it was incumbent on the plaintiff to prove the allegation of his amended declaration, that the defendant destroyed the note, beyond a reasonable doubt, which the court refused: *Held*, that such instruction was properly refused. *Grimes v. Hilliary*, 141.

6. *Secondary evidence—preliminary proof.* Where an action is brought upon lost or destroyed notes, the charge as to the manner of disposition of the notes is by way of excuse for not producing the original in evidence, and whether they were willfully or accidentally destroyed by the defendant is immaterial in laying the foundation for secondary proof. *Ibid.* 141.

7. The preliminary proof, laying the foundation for the introduction of secondary evidence of the contents of the lost instrument, is addressed to the court, and the court determines whether sufficient has been shown to permit the secondary evidence to go

**INCE. ACTION ON LOST NOTE. Continued.**

the jury, and the recovery, if one is had, is upon the instrument as proved. *Grimes v. Hilliary*, 141.

**REE OF PROOF.**

8. *In civil actions—based on the commission of a criminal offense.* has been held that where, under the pleadings, it becomes necessary to the maintenance of the plaintiff's cause of action or the defendant's defense to show that the opposite party has been guilty of a criminal offense, such offense must be proved beyond a reasonable doubt; but it does not follow that because an element may have entered into an act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proven to authorize a recovery in the civil action, the proof must be made beyond a reasonable doubt. *Ibid.* 141.

**MPETENCY.**

9. *Bill of discovery—when admissible evidence in an action at law.* Upon a trial of an action at law the allegations of a bill of discovery filed by the plaintiff are not competent evidence, on behalf of the plaintiff, for the purpose of proving any fact alleged in such bill. The only purpose for which any portion of the bill, in such case, can go to the jury, is to point the answer, and show to what it is responsive, where the answer would be otherwise unintelligible. *Ibid.* 141.

10. *Waiver of objection.* The plaintiff in an action for a personal injury testified, that prior to the injury she was receiving fifty cents a day for her work, but had made arrangements to go into business for herself, by which she could have made \$2.50 per day for her work. The last statement was admitted, over the defendant's objection. The plaintiff, in reply to the question, "You may state what you could have earned if it had not been for this accident," testified, "I could have earned \$2.50 per day," to which there was no objection, and the defendant accepted the statement and cross-examined upon it, as competent, without any inquiry as to the special arrangement: *Held*, that this might be considered as an abandonment of the objection. *City of Beardstown v. Smith*, 169.

**HEARSAY.**

11. *Res gestæ. Extra-judicial statements of third persons* can not be proved by hearsay, unless such statements are part of the *res gestæ*. *Carlton v. People*, 181.

**OFFERS OF SETTLEMENT.**

12. *As evidence of amount of claim.* A party whose personal or property rights are threatened with irreparable injury, may offer to accept a specified sum of money as a full compensation for the threatened injury; but such offer, when rejected, will have no

EVIDENCE. OFFERS OF SETTLEMENT. *Continued.*

tendency, as against the party making it, to show the amount or nature of his damages. *Village of Dwight v. Hayes*, 273.

13. The law favors offers of settlement, and will not permit them afterward to be used to the prejudice of the party who makes them. So the offer of a land owner to accept a certain sum for the privilege of emptying a sewer into a stream flowing over his land, and thereby polluting the water, when rejected by the other party, can not be resorted to for the purpose of showing that the damages to such owner and his property, which would result from discharging the sewage of a village into the creek, may be adequately remedied by a judgment at law. *Ibid.* 273.

## PROOF OF FRAUD.

14. *Whether sufficient—objection on appeal.* In a proceeding against the assignee of an insolvent bank to compel the surrender of a check to a depositor on the ground of fraud in obtaining the same by the bank, it appeared that the check was produced on the hearing, but the evidence failed to show by whom it was produced. It further appeared that the case was heard upon the tacit assumption that the assignee had possession of the check, the prosecution and defense being conducted wholly on other grounds. The objection that the proof failed to show that the assignee had the check was not made in the trial court: *Held*, that there was no such failure of proof as to require a reversal. *American Trust and Savings Bank v. Gueder & Paeschke Manf. Co.* 338.

## PRODUCTION OF BOOKS AND PAPERS.

15. *Order of court—in violation of constitution.* While an order for the production of a party's books on the trial, to be used as evidence, in proper cases and upon proper showing, is not an unreasonable seizure of such books, an order of court by which they are taken from his custody and committed to that of a third person, for an indefinite period of time, for an inspection, generally, into all his affairs by the opposite party and his counsel, with leave to take copies of the entries therein, is unwarranted by the law, and is a palpable violation of the constitutional right of a party to be secure against unreasonable seizure of his papers and effects. *Lester v. People*, 408.

16. *Section 9, chapter 51, of the Revised Statutes, relating to production of papers and books.* The purpose and design of section 9, chapter 51, of the Revised Statutes, are to furnish to a party litigant a speedy and summary mode by which a party, under the order of the court, may obtain written evidence pertinent to the issue, which is in the possession and control of his adversary, and thus obviate the necessity of a bill of discovery seeking the same end. *Ibid.* 408.

**EVIDENCE. PRODUCTION OF BOOKS AND PAPERS. *Continued.***

17. This section contemplates the production of evidence on the trial of the cause which the party applying therefor is entitled to introduce in support of his case, and which the other party withholds. A defendant is not required to disclose matters of evidence relied upon in the defense, and thus inform the plaintiff of his case further than the pleadings show. Matters purely of defense are the property rights of the defendant, which he may disclose or not upon the trial. *Lester v. People*, 408.

18. Under the statute the court has power to compel the production of the books of a party, to be used in evidence on the trial by his adversary, upon proper showing that they contain entries tending to prove the issues; but the statute can not be construed as giving the court power and authority to take the books and papers of the party and impound them with an officer of the court for inspection or examination, out of the presence of the court. The statute does not give the right to compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions. *Ibid.* 408.

**IMPEACHING WRITTEN INSTRUMENT.**

19. *Admissibility of parol evidence.* Where parties have reduced their contract to writing, the rule is well settled that parol evidence is not admissible to vary or change the terms of the contract, but where it is sought to impeach a written contract for fraud, in a court of equity, parol evidence is admissible for that purpose. *Grand Tower and Cape Girardeau Railroad Co. v. Walton*, 428.

**OWNERSHIP.**

20. *Evidence tending to prove ownership of a mine.* On the trial of a suit brought by a miner against the alleged owner and operator of a mine, one of the witnesses designated the mine as the defendant's, and one of the surgeons who treated the plaintiff for his injuries testified that the defendant paid him for attending on either the defendant or some one else injured at the mine: *Held*, that such evidence, uncontradicted, had some tendency to show that the defendant was the owner of the mine, and was sufficient evidence to justify the court in submitting the question to the jury. *Consolidated Coal Co. v. Bruce*, 449.

**OBJECTION SUSTAINED.**

21. *Question afterwards answered.* There is no error in sustaining an objection to a question, where the fact sought to be proved by it is afterwards shown by answer to another question to which no objection is made. *Mitchell et al. v. Hindman*, 538.

**PREPONDERANCE.**

22. *Degree of proof required.* An instruction in a civil action that the plaintiff was "bound to prove to the satisfaction of the

**EVIDENCE. PREPONDERANCE. Continued.**

jury, by a clear preponderance," is clearly erroneous, and properly refused. The law only requires that a preponderance of evidence shall be in favor of the plaintiff. *Mitchell et al. v. Hindman*, 538.

**OPINION OF A WITNESS.**

23. *When competent evidence.* See NEGLIGENCE, 23.

**MALPRACTICE.**

24. *Facts to be considered.* Same title, 35.

**PAROL EVIDENCE.**

25. *Showing a deed to be a mortgage.* See CONVEYANCES, 4 to 7.

**NEGLECT OF RAILROAD COMPANY.**

26. *Right to a side-track in a street—setting fires.* See RAILROADS, 4.

27. *Allowing dry grass and weeds on right of way.* Same title, 1, 2.

28. *Ordinance of a village as evidence.* Same title, 4.

**IN A CRIMINAL CASE.**

29. *Letters written by defendant.* See CRIMINAL LAW, 1.

30. *Dying declarations.* Same title, 2, 3.

31. *Proof of former conviction.* Same title, 5, 6.

32. *Threats and admissions of third persons.* Same title, 18, 19.

33. *Circumstantial evidence.* Same title, 11.

**MOTION TO EXCLUDE PLAINTIFF'S EVIDENCE.**

34. *Leave to amend the declaration.* See AMENDMENTS, 1.

35. *Overruling the motion.* See PRACTICE, 4, 5.

**PROOF OF VENUE.**

36. *In a criminal case.* See CRIMINAL LAW, 23, 24, 25.

**WANTON AND WILLFUL MISCONDUCT.**

37. *Ill-will is not material.* See NEGLIGENCE, 24.

**RES JUDICATA.**

38. *Proving matters litigated—by parol evidence.* See FORMER ADJUDICATION, 3.

**WITNESSES.**

39. *Compelling attendance.* See PRACTICE, 2.

**EVIDENCE IN CRIMINAL CASES. See CRIMINAL LAW, 1 to 26.****EXCEPTIONS AND BILLS OF EXCEPTIONS.****BILL OF EXCEPTIONS.**

1. *Whether amendable.* Upon the filing of a bill of exceptions it becomes a part of the record in the cause, and if, for any reason, it fails to fully and correctly show what actually transpired at the trial, it, like other portions of the record, is amendable. *Chicago, Milwaukee and St. Paul Railway Co. v. Walsh*, 607.



**EXCEPTIONS AND BILLS OF EXCEPTIONS.****BILL OF EXCEPTIONS. Continued.**

2. After the term has expired at which the record is made, or the time limited for settling the bill of exceptions has passed, the amendment can be made only by bringing the parties in interest again into court, by the service of proper notice, and then only when there is some memorandum, minute or note of the judge, or something appearing on the records or files of the court, to show the facts in respect of which the amendment is sought to be made. *Chicago, Milwaukee and St. Paul Railway Co. v. Walsh*, 607.

3. Where the trial court makes an amendment of a bill of exceptions, in the absence of any exception to the source of information upon which the court acted it will be presumed there was something to amend by,—some note or memorandum of the evidence sufficient to enable the court to make the proper amendment; and it is incumbent upon the party objecting to the amendment, to show, by bill of exceptions, upon what the court acted, if he intends to question its sufficiency to authorize the amendment to be made. *Ibid.* 607.

4. The judge, in an order allowing an amendment of a bill of exceptions, certified that on the motion to amend he examined the record in the case, including the stenographer's transcript of the evidence theretofore filed and made a part of the record, and the various papers and exhibits introduced in evidence; that he kept some minutes of the evidence heard at the trial, but not sufficiently full to authorize the making of the certificate from said minutes alone, but that on the motion for new trial the original bill of exceptions, which contained the stenographer's transcript of the evidence, was examined by him; and the judge then certified that from his personal knowledge and recollection it was true that the bill of exceptions contained all the evidence in the case: *Held*, that such certificate was sufficient to authorize the amendment of the bill of exceptions. *Ibid.* 607.

5. *Amending from a stenographer's notes.* It is true that the amendment could not be made from the personal knowledge or recollection of the judge. The judgments and records of courts can not be permitted to rest upon so uncertain a foundation. But if the judge acts upon sufficient matters shown by the record, independent of his personal recollection, and allows an amendment, there will be no error. The court may also refer to the report of the evidence made by a stenographer, though not bound to take it as true. *Ibid.* 607.

6. And when the trial judge has in apt time approved the transcript made by an official stenographer, as being a correct transcription of the evidence, there can be no objection to his referring

## EXCEPTIONS AND BILLS OF EXCEPTIONS.

BILL OF EXCEPTIONS. *Continued.*

to the same as accurate data upon which to predicate his future order in the cause. *Chicago, Milwaukee and St. Paul Railway Co. v. Walsh*, 607.

7. *Amending—preserving a record of proceedings therein.* Where the court allows an amendment of a bill of exceptions, if either party requires it, a bill of exceptions will be allowed showing the facts upon which the action of the court is based. But when the court recites in its order the facts upon which the amendment is predicated, and which is duly signed and sealed by the judge, it performs the office of a bill of exceptions, and there is no objection to the practice of thus preserving in the record such facts. *Ibid.* 607.

## TRANSCRIPT OF RECORD.

8. *Incorporating therein the original bill of exceptions.* See APPEALS AND WRITS OF ERROR, 19, 20, 21.

## ASSIGNING ERRORS.

9. *Exceptions not preserved in the record.* See PRACTICE IN THE SUPREME COURT, 1.

## MOTION FOR NEW TRIAL.

10. *Overruling—preserving exceptions.* Same title, 3.

## FIRES.

## SET BY LOCOMOTIVE.

*Liability of railway company—evidence.* See NEGLIGENCE, 31, 32, 33.

## FOOT-PRINTS.

## AS EVIDENCE.

*To prove arson.* See CRIMINAL LAW, 17.

## FORECLOSURE SALE.

## DISCHARGES MORTGAGE LIEN.

*Rights of mortgagor.* See MORTGAGES AND DEEDS OF TRUST, 6 to 12.

## FORFEITURE.

## OF CONTRACTS.

*Against insane persons.* See INSANE PERSONS, 1, 2, 3.

## FORMER ADJUDICATION.

## DIFFERENT CAUSES OF ACTION.

1. *Having the same fact at issue.* Where some controlling fact or matter material to the determination of two causes of action has

**FORMER ADJUDICATION. DIFFERENT CAUSES OF ACTION. Continued.**

been adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again at issue between the same parties, the adjudication of the fact or matter in the first suit, if properly presented, will be conclusive upon the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not. *Leopold et al. v. City of Chicago*, 568.

2. Where a city filed its petition for condemnation of a part of a lot for an alley, and the lot owner filed a cross-petition for damages to the part of the lot not taken, and the owner offered proof of damages, and the city offered evidence showing benefits to the remainder of the lot, and the jury found no damages, it was held, in a proceeding by the city to assess benefits on the part of the lot not taken, that the land could not be assessed a second time for the benefits accruing from the improvement. *Ibid.* 568.

3. *Parol evidence—to show matter litigated in prior suit.* It is ordinarily sufficient, where a judgment is relied on as a bar to a subsequent suit, that the issues are the same in both cases; but where the adjudication of some material fact or matter is relied upon as an estoppel between the same parties, parol evidence of what occurred on the former trial,—what was actually submitted and determined,—is always admissible. *Ibid.* 568.

**FORMER DECISIONS.****MATTERS CONSIDERED ON APPEAL.**

1. *Excessive damages—a question of fact.* The ruling of this court in *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183, and *Chicago and Northwestern Railway Co. v. Jackson*, 55 id. 492, holding that this court might pass upon the fact whether the damages awarded are excessive, was made before the passage of the statute making the finding of facts by the Appellate Court conclusive upon this court. *West Chicago Railroad Co. v. Bode*, 396.

**ASSIGNMENT OF DOWER.**

2. *By infant heir.* The statement in *Lenfers v. Henke*, 73 Ill. 405, that, at common law, an infant heir may assign dower, is held to be *obiter dictum*. *Rawson v. Corbett et al.* 466.

**EMINENT DOMAIN.**

3. *Special benefits and damages to property not taken.* See **EMINENT DOMAIN**, 16 to 21.

**COMPARATIVE NEGLIGENCE.**

4. *The doctrine of the earlier cases renounced.* See **NEGLIGENCE**, 18.

## FRAUD.

## OF ATTORNEY.

1. *Taking deed to aid grantor in defrauding creditors.* Where a person conveys all his real estate to his legal adviser, for the purpose of placing it beyond the reach of his creditors as well as to secure a debt due the grantee, and is induced to do so by the advice and artifice of the grantee, a court of equity will treat the deed as a mortgage, and allow a redemption, notwithstanding the fraud attending the transaction, the parties not being *in pari delicto*. *Herrick v. Lynch et al.* 283.

2. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices. *Ibid.* 283.

## RESCINDING SALE.

3. *Setting aside deed obtained by fraud.* Where the consideration of a deed for land is the sale of a stallion, which was represented by the seller to be about the age of eleven years and a sure foal-getter, when, in truth, such horse was more than nineteen years old and entirely worthless as a foal-getter, and of no value for any purpose, and the purchaser, on learning that the horse was worthless, notified the seller that the horse was subject to his order, it was held, that a court of equity would set aside the deed for the fraud of the grantee, and that the deed was without consideration. *Dawson et al. v. Vickery*, 398.

4. *Damages recoverable on rescinding sale for fraud.* The buyer of chattel property which proves to be worthless has not the right to keep it an indefinite time after discovering the fraud practiced on him, and recover from the seller the expense of taking care of it. For such a breach of a contract the buyer must act with reasonable promptness, and can only recover such damages as he thereby sustains. *Ibid.* 398.

5. A decree found that the sale of a stallion was effected by false and fraudulent representations of the seller as to the age and qualities of the animal, which was entirely worthless, and that the buyer, immediately on learning that the horse was worthless, notified the seller that the horse was at the purchaser's stable subject to the seller's order, and that the latter refused to take it away, and the buyer kept such horse from May 10, 1889, to July 10, 1890, and that the care and expense of keeping the animal for such period was reasonably worth \$222.50, which the seller was decreed to pay the buyer: *Held*, that the decree as to the damages required to be paid by the seller was erroneous, and not sustained by the facts found therein. *Ibid.* 398.

## RNISHMENT.

## QUITABLE ASSIGNMENT.

*Protected in a court of law.* See ASSIGNMENT, 3.

## S PIPES.

USE OF A STREET THEREFOR. See HIGHWAYS, 12, 13.

## GUARDIAN AND WARD.

## GUARDIAN'S LIABILITY.

1. *Interest on money not loaned.* A guardian is liable to his wards for interest on money coming to his hands which he neglected to loan, and which might have been loaned. *Rawson v. Corbett et al.* 466.

## ACCOUNT.

2. *How to be stated.* Where, at the time a guardian receives a sum of money belonging to his wards, they are indebted to him in considerable amounts, and he continues thereafter to make advances for their maintenance and education, and to pay other sums of money that are charges against their estate, the correct rule for stating his account is to arrange the items thereof in chronological order, and make annual rests. *Ibid.* 466.

3. Where, however, the guardian fails for several years to make an inventory or annual report, and makes his final account without annual rests, and no objection is made thereto by the wards, the court may adopt the course of adding to his account such items as he should have been charged with but are omitted by him. *Ibid.* 466.

## ATTORNEY'S FEE.

4. *Allowance of an attorney's fee.* Where the failure of a guardian to file an inventory and make reports required by law is the principal cause of the intricate and complex condition in which his accounts are involved, and the great labor required in attending to the matter is owing to his own neglect, his wards ought not to be required to pay an attorney's fee for services in stating the account. *Ibid.* 466.

## HIGHWAYS.

## DEDICATION.

1. *Acceptance by the public.* The fencing of land to correspond with an old road not laid out, without acceptance after that by the public, does not constitute a highway by dedication. *Town of Brushy Mound v. McClintock*, 129.

## PRESCRIPTION.

2. *Establishing by prescription—passive use.* The user of private property, to ripen into a prescriptive right, must be adverse to the

HIGHWAYS. PRESCRIPTION. *Continued.*

owner. Mere passive use is never sufficient. It must also be open, adverse and under claim of right. *Town of Brushy Mound v. McClintock*, 129.

3. *Over uninclosed lands.* In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner. Express notice is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform the owner that the highway is used under a claim of right. *Ibid.* 129.

4. Where a road through uninclosed land was on a tortuous line, the little work done on it in all the years it had been traveled can not be said to be notice that it was being used under a claim of public right. Where the authorities allowed other parts of the way to be fenced up and changed, the owner of the land had the right to presume that the road over it was being used by the public just as it was over other lands, and that by permitting it to be so used none of his rights were waived. *Ibid.* 129.

5. *Suffering parts of the road to be closed.* On the question whether a road is a highway by prescription, and especially where it is at least doubtful whether the user over a party's land was adverse, under a claim of right, or merely by permission, it is proper to show how the public authorities treated the road at other places, and that they suffered the owner of the lands to fence up the road. *Ibid.* 129.

6. *Changes in the line:* In determining whether, under the evidence, a public highway has been established over a defendant's land, the testimony as to changes at other points is also to be considered, as it is a part of the evidence in the case bearing on that question. *Ibid.* 129.

## LAYING OUT A ROAD.

7. *Who may appeal—power of supervisors.* Any person interested in the decision of the commissioners of highways in laying out or refusing to lay out a highway, or in the verdict of the jury in assessing the damages, is given the right to an appeal to three supervisors, before whom the trial is to be *de novo*. This applies to appeals from the order of commissioners of highways in and about the laying out of roads for private and public use, under the provisions of section 54, chapter 121, of the Revised Statutes. *Wright v. Highway Comrs. of the Town of Carrollton*, 138.

8. *Meeting to hear objections.* A meeting of the commissioners of highways on a petition to lay out a road was appointed to convene at the west end of the proposed road, to examine the route

**HIGHWAYS. LAYING OUT A ROAD. Continued.**

of the same and hear reasons for or against laying out the road. Record of this meeting was indorsed on the petition, as follows: "February 10, 1893.—Commissioners met at the beginning of the road mentioned within, at ten o'clock A. M., and walked over said road to the east end, and then, after hearing reasons for and against the location of said road, granted the prayer of the petition:" *Helt*, that the record showed, with sufficient clearness, that the commissioners did, in fact, meet at the west end of the road. *Smith v. Comrs. of Highways et al.* 385.

9. In such case it was wholly immaterial whether the hearing of reasons for and against the laying out of the road was had at the west end before, or at the east end after, the commissioners had viewed the route. Such meeting was one continuous proceeding. *Ibid.* 385.

10. *Presenting a second petition to lay out a road.* The fact that the commissioners of highways may have refused a petition for the laying out of a road is no bar to the presentation of a second petition for the same purpose. Section 48, which prohibits the filing of a second petition within two years, relates only to cases where an order has been granted for laying out the road, and damages are assessed, and the commissioners, or, in case of an appeal, the supervisors, are of the opinion that the damages assessed are too high, so as to be an unreasonable burden upon the tax-payers. *Ibid.* 385.

**STREETS IN A CITY.**

11. *Uses to which they may be appropriated.* The general rule long recognized by this court is, that, having the free and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the object for which they were established. *Barrows v. City of Sycamore*, 588.

12. *Laying water, gas and sewer pipes under a street.* In the application of the rule it has been held that a city council may lawfully authorize the laying of railroad tracks upon, and water, sewage and gas pipes under, public streets, and that property owners could neither enjoin such use, nor recover damages to property occasioned thereby. *Ibid.* 588.

13. *Laying pipes under the streets for the purpose of distributing water and gas and to carry off sewage, is lawful, both because it is necessary for the health, comfort and convenience of the inhabitants, and because it in no way interferes and is not incompatible with the use of such streets for public travel; yet it can not be contended that the water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use.* *Ibid.* 588.

### HIGHWAYS. STREETS IN A CITY. *Continued.*

14. *Erection of stand-pipe in street.* The erection of a stand-pipe or water works in a public street, near the buildings along the street, is an unlawful use of such street, and the manner of operating the structure, or its dimensions, affect only the question of damage to property holders. *Barrows v. City of Sycamore*, 588.

#### OBSTRUCTION OF STREETS.

15. *Liability of city for obstructing a street.* A city has no right to so obstruct public streets as to deprive the public and adjacent property holders of their use, as such. Their primary object is for ordinary passage and travel, and the public and individuals can not be rightfully deprived of such use. *Ibid.* 588.

16. *Who may complain of obstructions.* It is well settled that for obstructions to streets, resulting in no special injury to an individual, the public alone can complain. There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law affords no relief, as, for instance, the building of a jail, police station, or the like, near private property. *Ibid.* 588.

17. If an obstruction in a street does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect of his property, in excess of that sustained by the public generally. *Ibid.* 588.

18. In the absence of any statutory or constitutional provision on the subject, the common law affords redress in all such cases, and it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. Where the action is by an individual, the special injury is the gist of the action, and unless it is alleged and proved there can be no recovery. *Ibid.* 588.

### INFANTS.

#### ASSIGNING DOWER.

1. Former decision in *Lenfers v. Henke*, 73 Ill. 405, stating that, at common law, an infant heir may assign dower, held to be *obiter dictum*. *Rawson v. Corbett et al.* 466.



**INSANE PERSONS.****CONTRACTS.**

1. *Declaring forfeiture against.* After a person has been adjudged insane, no forfeiture of his contract for a failure on his part to pay certain sums of money, as, an installment of interest and taxes on land, can be declared, except by decree of a court of competent jurisdiction where he is properly represented by a conservator or guardian. *Helbreg et al. v. Schumann et al.* 12.

2. *Selling aside a forfeiture.* A declaration of the forfeiture of rights under a contract, after the party affected has been adjudged insane, and the obtaining of possession of the premises to which the contract relates, will be regarded as fraudulent, and will, in a court of equity, be set aside, and the insane person restored to his rights under such contract. *Ibid.* 12.

3. Courts of equity will set aside contracts made with insane persons on the ground of fraud. Such persons being incapable, for the want of capacity, to enter into a valid contract or do any valid act, all persons dealing with them with knowledge of this incapacity are regarded as perpetrating a fraud upon them. *Ibid.* 12.

**INSOLVENT DEBTORS.****ASSIGNMENT.**

1. *For the benefit of creditors—what constitutes.* An assignment for the benefit of creditors is a transfer, without compulsion of law, by a debtor, of some or all of his property to an assignee or assignees, in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. It implies a trust, and contemplates the intervention of a trustee. *Walker et al. v. Ross et al.* 50.

2. An absolute conveyance made directly to the creditor in payment, or any form of lien given as security for the payment, of a *bona fide* debt, though having the effect to give the creditor a preference, is not an assignment for the benefit of creditors, within the meaning of the statute. Wherever such instruments have been held void under section 13 of the Assignment act, it has been upon the ground that, having been made in contemplation of an assignment in trust afterward actually executed, they were to be deemed a part of it. The statute does not contemplate a constructive assignment. *Ibid.* 50.

3. The court has repeatedly said that the statute contemplates no such thing as a constructive trust, and the cases in this court hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned, in trust, for the benefit of creditors. *Ibid.* 50.

4. A transfer of property, to be treated as a voluntary assignment under the statute, must be a conveyance to an assignee in trust for

INSOLVENT DEBTORS. ASSIGNMENT. *Continued.*

the creditors. A transfer of property by an insolvent directly to his creditor, for the purpose of securing or providing the means for the payment of that creditor, only, is not a voluntary assignment. *Peterson v. Brabrook Tailoring Co. et al.* 290.

5. *Whether effected by giving judgment notes.* The giving of judgment notes by an insolvent corporation, due on demand, to three of its creditors, followed by the entry of judgments thereon and the levy of executions on all the tangible property of the corporation, will not, of itself, constitute a voluntary assignment, nor is it, in any proper sense, a diversion or misappropriation of a trust fund. *Ibid.* 290.

6. *Corporation preferring creditors.* The mere fact that a corporation may be insolvent does not so far charge its directors and officers with the character and functions of trustees as to take from them the power to make preferential transfers of the corporate assets; so long as they act in good faith, and do not attempt to prefer themselves. *Ibid.* 290.

7. *Debtor misapplying funds—effect on innocent creditors.* A corporation being unable to meet its obligations, procured a loan of \$5000 from certain of its creditors to enable it to continue business, and gave them its judgment notes for their debts and such loan, which notes were payable on demand. The creditors, becoming fearful of trouble with other creditors, caused judgments to be entered on their notes, and took out executions, which were levied on all the tangible property of the corporation. The \$5000 loan was afterward paid over to the principal stockholder, to apply on indebtedness to her: *Held*, that the misapplication of the loan could not affect the creditors thus secured, they being in no respect privy to such misapplication. *Ibid.* 290.

8. *Right to prefer creditors by sale or mortgage.* A debtor, solvent or insolvent, notwithstanding the statute relating to voluntary assignments, may lawfully transfer any part or the whole of his property in payment, or incumber it by mortgage, deed of trust in the nature of a mortgage, judgment confessed, or pledge, as security for the payment of such debts preferred. By selling or mortgaging his property directly to his creditors, the debtor exercises a clear, legal right. His right, by such means, to prefer some creditors to others, is not affected by the statute. *Walker et al. v. Ross et al.* 50.

9. *Appeal from order of distribution.* No appeal lies to the circuit court, from an order of the county court, refusing to order payment, by the assignee of an insolvent bank, of a dividend on certain certificates of indebtedness against the insolvent bank. *Heinselman Bros. et al. v. Schrader*, 227.

## INSTRUCTIONS.

## THEIR QUALITIES.

1. *Refusing correct propositions of law.* Where refused instructions contain correct propositions of law, yet if the instructions given contain all the law necessary for the jury to arrive at a correct verdict, there will be no error. *Jacobson v. Gunzburg*, 135.

2. *Repeating instructions.* A defendant can not complain of the refusal of an instruction if its substance is embodied in instructions which are given, and in so holding this court does not necessarily hold such given instructions to be correct. *Carlton v. People*, 181.

3. *Inapplicable to the case on trial.* Where the negligence charged against a city was not in failing to construct a proper crossing, but in digging and maintaining an open ditch across a path in a street which was used by the public, an instruction laying down the proposition, that the question whether a street crossing should or should not be constructed was left to the city authorities, and the city had a discretion in such matters with which the courts would not interfere except when abused, and that until the city exercised its discretionary power by constructing a street crossing, or allowing it to be constructed, it was not liable for damages resulting wholly from the absence of such street crossing, is properly refused, as being inapplicable to the case before the jury. *City of Beardstown v. Smith*, 169.

4. *Should not be argumentative.* The jury have little to do with the theory and policy of the law, and instructions should be so drawn as to be a concise and accurate statement of the law as applicable to the facts of the particular case. If they call the attention of the jury, in an argumentative manner, to matters with which they have no immediate concern, there will be no error in their refusal. *Metropolitan West Side Elevated Railway Co. v. Stickney et al.* 362.

5. *Assuming defendant's negligence—error cured by other instructions.* On the trial of an action against a railway company for causing the death of the plaintiff's intestate, the court instructed the jury, at the plaintiff's request, that if they believed, from the evidence, that the deceased was exercising ordinary care for her own safety, "and came to her death by reason of the negligent act of the defendant as charged in the plaintiff's declaration," then the jury should find the defendant guilty: *Held*, that the instruction, if construed strictly, and without reference to other instructions given, was obnoxious to the objection that it assumed the fact that the defendant was negligent as charged, and submitted to the jury the mere question whether the deceased came to her death by means thereof. But such defect was cured by other instructions. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Baddeley*, 328.

INSTRUCTIONS. OF THEIR QUALITIES. *Continued.*

6. *Directions as to the burden of proof.* It is not necessary that the instructions for the plaintiff shall state where the burden of proof rests. It is sufficient if, from all the instructions given to the jury as the charge of the judge, it clearly appears, and is so stated to the jury, upon whom the burden rests. If one of the instructions for the defendant positively states on whom it rests, that will be sufficient. *Mitchell et al. v. Hindman*, 538.

7. *Directions as to the preponderance of the evidence.* An instruction that the preponderance of the evidence is not alone determined from the number of the witnesses testifying, but the jury should take into consideration the opportunities of the witnesses for seeing or ascertaining, from their own personal knowledge, the things about which they testify, and the probability or improbability of the truth of their statements, in view of all the other evidence, facts and circumstances proven, and from the circumstances determine the preponderance, etc., does not exclude from the jury the consideration of expert evidence. *Ibid.* 538.

8. *Whether authorizing recovery on counts not proved.* An instruction that if the jury believed, from the evidence, that the plaintiff's intestate, while exercising ordinary care, was killed by the negligence of defendant, as charged in the declaration, they should find for the plaintiff, is not erroneous on the ground that the evidence did not tend to sustain one or more of the counts in the declaration. *Lake Shore and Michigan Southern Railway Co. v. Hessions*, 546.

9. *Referring to the ad damnum—not commended.* See PRACTICE IN THE SUPREME COURT, 17.

## INSURANCE.

## INTEREST IN PROFITS.

1. *Whether an insurable interest.* A and B were engaged in the grain business, and were operating an elevator, which was owned by A, who also owned the ground on which it was located. B advanced no money to carry on the business, but under an arrangement with A he took charge of the business at the elevator, and was to receive as a salary one-half of the profits realized out of the business. B's liability with A to the party owning grain stored in the elevator, to hold and ship the grain to such owner or to his order, as provided in the warehouse receipts, and his right to share in the profits in payment of his salary, was held an insurable interest upon the property, upon which he could take out a policy for his own benefit. *Traders' Ins. Co. v. Pacaud et al.* 245.

## CONTRACT OF INSURANCE.

2. *Who may sue on policy.* Where a party contracts for the insurance of property, pays the premium, and the policy makes the

# URANCE. CONTRACT OF INSURANCE. *Continued.*

loss payable to him, the agreement to pay the loss is a contract with the person who pays the consideration, and he will have a right of action in his own name, although the insurance is in the name of another. *Traders' Ins. Co. v. Pacaud et al.* 245.

3. A and B, the owners of grain stored in an elevator, took a policy of insurance on the grain to C, of the firm of C & D, the parties with whom the grain was stored, which policy provided that the loss, if any, should be paid to A and B, as their interest may appear. A and B alone applied for the insurance, and they alone paid the premium, and the policy was delivered to them: *Held*, that A and B could maintain an action in their own names for any loss that might occur. *Ibid.* 245.

4. *Limited interest in property insured—duty to disclose real interest.* A policy of insurance provided that if the interest of the assured in the personal property should be "other than unincumbered ownership, without such fact being indorsed upon the policy, the same should be void." The policy was to M., of the firm of M. & B., warehousemen, with whom the property was stored, and contained a clause that loss should be payable to P. & Co., as their interest might appear. B. had no title to the property, but only an interest in the profits of the business of buying and storing grain, and was liable with M. to hold and ship the grain, as provided in the warehouse receipts issued by M. & B.: *Held*, that while B. had an insurable interest in the grain stored, his interest was not one which the assured were required to disclose when they took out the policy. *Ibid.* 245.

## CONTRIBUTION.

5. *In case of other insurance.* A condition in a policy of insurance which provides that in case of any other insurance upon the property insured, made prior or subsequent to the policy, the assured should be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured thereon, has no application where the other insurance is of a separate and distinct interest in the property. It applies only where the insurance covers the same interests. *Ibid.* 245.

## ASSUMING CORPORATE POWERS.

6. *Limiting liability—assuming perpetuity.* See CORPORATIONS, 2.

## INTEREST.

### GUARDIAN'S ACCOUNT.

*Annual rests.* See GUARDIAN AND WARD, 2, 3.

## INTOXICATING LIQUORS.

## CAUSING DEATH.

1. *Joint liability of seller and owner of premises where sold.* In an action by a widow and her infant children against a saloon-keeper and the owner of the premises where the liquor was sold, to recover damages for a loss of the plaintiffs' means of support, caused by the death of their husband and father from intoxication, the allegation of ownership in the premises upon which the liquor was sold makes such owner jointly liable with the seller of the liquor, by the terms of the statute. *Helmuth et al. v. Bell et al.* 263.

2. *Joint action by widow and children.* Where a man loses his life through intoxication, having a wife and children of tender years, who live together and constitute but one family, whereby they lose their means of support, while the wife may sue alone, no reason is perceived why the wife and children may not join in an action to recover for the loss. *Ibid.* 263.

3. *Joint action by parents of the deceased.* If a father and mother living with a son upon whom they are dependent for support, and who is providing for them, are deprived of the same in consequence of the intoxication of the son, it would seem unreasonable to hold that two actions instead of one should be brought by the parents. The words "in his or her own name" may, by the express language of the statute, be read in the plural. Where joint interests are affected a joint action may be brought. *Ibid.* 263.

## JOINT LIABILITY.

ACTION FOR TORT. See NEGLIGENCE, 1.

## JURISDICTION.

## LAW AND EQUITY.

*Concurrent jurisdiction.* See CHANCERY, 4, 5.

## JURY.

## IMPROPER CONDUCT OF PARTIES.

1. *Conversation with a juror—whether ground for new trial.* See NEW TRIALS, 2.

2. *Furnishing the jury a free lunch.* See PRACTICE, 22, 23, 24.

## VIEW BY A JURY.

3. *In condemnation proceedings.* Same title, 16, 17, 18.

## LACHES.

## AS A DEFENSE.

1. *Who may not complain.* See EJECTMENT, 7.

2. *Must be pleaded.* See LIMITATIONS, 1.

## DLORD AND TENANT.

### LEASE CONSTRUED.

1. *Extension of term—option of lessor to extend or sell to lessee.* In 1875 the owner of premises leased the same from May 1, 1875, to May 1, 1880. The lease was extended, from time to time, by indorsements made thereon, the last being April 23, 1890, extending the lease from May 1, 1890, to May 1, 1895, which indorsement was as follows: "This lease \* \* \* is extended five years from May 1, 1890, upon the same terms and conditions of above extension made and dated April 8, 1885. At expiration of this extension it shall be the privilege of the party of the first part, or his heirs or assigns, to extend the said lease from May 1, 1895, at \$1200 per year, payable in monthly installments, with all the conditions of the original lease, or to sell \* \* \* the party of the second part \* \* \* for \$30,000, the said party of the second part accepting the above conditions and terms." *Held*, that the extension of 1890 gave the lessee no rights in the property after May 1, 1895. *Pearce v. Turner et al.* 116.

2. The advantage to be derived from the privilege was a part of the consideration for the extension of the lease from May 1, 1890, to May 1, 1895, and the fact that the lessee accepted the terms and conditions of the extension from May 1, 1890, to May 1, 1895, including the privilege in question, did not operate to impose upon the lessor a contract to either extend the lease to May, 1900, or sell the premises at the figure named. *Ibid.* 116.

3. *Breach of covenant not to assign—rights of lessor.* A lease contained an agreement of the lessee that neither he nor his legal representatives would underlet said premises, or any part thereof, or assign the lease, without the written consent of the lessor, and then provided that if default should be made in any of the agreements or covenants of the lessee, (which included the covenant not to assign,) then the lessor should have the right to declare the term ended, and re-enter: *Held*, that this was not a mere covenant not to assign, but was a power of re-entry for a breach of a covenant, having the force of a condition. *Kew v. Trainor*, 150.

4. A lease contained a covenant that neither the lessee nor his legal representatives would assign the same without the lessor's written consent, and provided for a forfeiture and right of re-entry by the lessor for the breach of any of the covenants. The lessee, with the written consent of the lessor, assigned the lease, with a stipulation that no further assignment should be made without like assent of the lessor: *Held*, that the lessor had the right to forfeit the term, and re-enter, for an assignment of the lease by the assignee without his consent. *Ibid.* 150.

5. *Rights and liabilities of assignee of lessee.* A party, by accepting the assignment of a lease, and agreeing to perform all the cov-

**LANDLORD AND TENANT. LEASE CONSTRUED. *Continued.***

enants and conditions of the lessee, becomes obligated to perform all the terms and conditions of the lease in as full and complete a manner as the original lessee; and when the assignee, in consideration of the lessor's written consent to the assignment, stipulates that no further assignment shall be made without the written consent of the lessor, and expressly agrees to perform all the covenants and conditions of the lease, he thereby assumes the position of the original lessee, and will have the same powers of the original lessee, and no other. *Kew v. Trainor*, 150.

**ASSIGNMENT OF LEASE.**

6. *Liability of assignee of lease not defeated by his assignment.* If it be conceded that an assignee of a lease is discharged from liability for subsequent breaches by his assignment of the lease, yet his transfer will not have the effect of discharging him for breaches of the covenant already committed, when there was a privity of estate between him and the lessor, and an implied provision to pay the damages occasioned by such breach. *Consolidated Coal Co. v. Peers et al.* 344.

7. *Liability of successor of lessee.* Where the lessee of a railroad agrees, on behalf of itself and its successors and assigns, to comply with the terms of the lease, and, among other things, to pay the rent reserved, and other charges, a person or company who succeeds to the rights of the lessee, and continues to use the leased premises as the lessee had done, will become liable to pay the rent specified in the lease to the lessor. *Jacksonville, Louisville and St. Louis Railway Co. v. Louisville and Nashville Railroad Co.* 480.

8. In an action by a railway company against the successor of its lessee, the court instructed the jury, on behalf of the plaintiff, that if they believe, from the evidence, that the defendant is the successor of the lessee, and, as such successor, came into possession of the property, rights and franchises of the lessee, and that the defendant, since coming into such possession, had been operating such railway and running its trains over the plaintiff's railroad, and using the terminal facilities of the plaintiff for freight and passenger business, and had been furnished with supplies, etc., and that defendant has claimed the right, under the contract of leasing, to operate its trains over plaintiff's railroad between the points named in the lease, and to use plaintiff's terminal facilities in its business, then the defendant is liable to the plaintiff for such sum as they might find, from the evidence, was due, under the original lease, for rent of track, etc.: *Held*, that the instruction was not erroneous. *Ibid.* 480.

9. *Formal assignment not necessary to recovery.* In an action by the lessor against one as the successor of the lessee, if both parties



**LANDLORD AND TENANT. ASSIGNMENT OF LEASE. Continued.**

recognized and acted under the contract of leasing as a valid and binding contract between them during the time the defendant used and occupied plaintiff's property, no formal assignment of the lease by the lessee will be necessary to a recovery under it by the plaintiff for a breach of its conditions. *Jacksonville, Louisville and St. Louis Railway Co. v. Louisville and Nashville Railroad Co.* 480.

**USE AND OCCUPATION.**

10. *Recovery of rent under common counts.* In an action by the lessor of a railroad, under the common counts, the plaintiff is not bound to prove a special contract, in order to recover a reasonable price for the use and occupation of its property. *Ibid.* 480.

**MINING ROYALTY.**

11. *Recovery as rent.* See **CONTRACTS**, 14, 15, 16.

**LEASE.****ASSIGNMENT.**

1. *Rights of lessor.* See **LANDLORD AND TENANT**, 3, 4.
2. *Liabilities of assignee and his successors.* Same title, 5 to 8.

**LEASEHOLD ESTATE.****MORTGAGE BY LESSEE.**

*Extent of lien—extinguishment.* See **MORTGAGES AND DEEDS OF TRUST**, 1 to 4.

**LIBRARY.****LIBRARY ACT.**

*Effect on the trustees under the Newberry will.* See **NEWBERRY LIBRARY**, 3.

**LIENS.****VENDOR'S LIEN.**

1. *Notice to second purchaser.* If the purchaser of land knows that his vendor is still owing a part of the purchase money, for which no security has been given, he will take the land subject to the implied lien of the original vendor. *Koch et al. v. Roth*, 212.

2. *Promise to pay creditors of vendor.* Where the grantee of land agrees with the grantor to pay a definite part of the purchase money upon debts of the latter, the lien of the vendor will not be waived. On principle there is no good reason why there shall not be a lien for unpaid purchase money due the vendor, whether such money is to be paid into the hands of the vendor himself, or into the hands of a creditor for his benefit. Equity looks to substance, and not form. *Ibid.* 212.

**LIENS. VENDOR'S LIEN. Continued.**

3. *In case of exchange of lands—promise to discharge liens.* It has been held, that where there is an exchange of lands, a covenant by one of the parties to pay off the liens on the lands transferred by him, as part of the consideration of the land deeded to him, is as much an agreement to pay a part of the purchase money as though there had been an agreement to pay that amount directly to the vendor to enable him to pay off the liens. *Koch et al. v. Roth*, 212.

4. *Limited to unpaid purchase price.* The grantor's lien is only permitted as a security for the unpaid purchase price of land sold, and not for any other indebtedness or liability. There must be a certain, ascertained, absolute debt owing for the purchase price. The lien does not exist on behalf of any uncertain, contingent or unliquidated demand. *Ibid.* 212.

5. *Waiver of the lien.* Where the obligation of the vendee to discharge a definite amount of indebtedness owing by the vendor appears to be substituted for the purchase money, or to be taken instead of the purchase money, or as a direct security for it, the lien is lost. *Ibid.* 212.

6. Where land and personal property are sold together, under one contract, at a gross price, without stating the separate price of the land and personalty, so that it can not be determined what part of the gross price is for the one and what part is for the other, there will be a waiver of the vendor's lien, as it will be presumed that the vendor intended to rely upon the personal responsibility of the vendee. *Ibid.* 212.

**MECHANIC'S LIEN.**

7. *Statute to be strictly pursued.* This court has repeatedly held that the statute relating to mechanic's liens is to be strictly pursued, and that a party seeking a lien thereunder must show compliance with its provisions. *Cary-Lombard Lumber Co. v. Fullenwider*, 629.

8. *Sub-contractor—section 29 of Lien act construed.* Section 29 of the Lien act creates a lien in favor of a sub-contractor or material-man, without limitation other than that the liens therein authorized shall not exceed the price fairly stipulated to be paid by the owner to the original contractor for the building or improvement made, and shall not exceed the amount of indebtedness due from the owner to the original contractor. *Ibid.* 629.

9. *Sections 30 and 31 of the act construed.* The purpose of sections 30 and 31 of the act relating to mechanic's liens was to require notice to the owner, to the end that he should be protected against liens of which he had no notice, and the notice thereby required applies to sub-contracts not completed when it was given.

**LIENS. MECHANIC'S LIEN. Continued.**

Section 31, requiring notice to be served within forty days from the completion of the sub-contract, is a limitation of the time, beyond which notice will cease to be effective to protect the rights of the sub-contractor under section 29 of the act. *Cary-Lombard Lumber Co. v. Fullenwider*, 629.

10. *Time of service of notice by the sub-contractor.* The notice which a sub-contractor is required to give the owner, under section 31 of the act, in order to preserve his lien, may be given at any time after the sub-contract is made, and before the expiration of forty days after completion of the sub-contract, or forty days after payment should have been made to the person performing labor or furnishing the materials. *Ibid.* 629.

11. *Lien under contract payable in monthly installments.* A contract was made for the furnishing of materials to be used in the erection of a building, the same to be furnished as the work progressed, and to be paid for in monthly payments, so that all the materials supplied in any month were to be paid for on the first of the next succeeding month: *Held*, that the contract was an entire contract, and that the sub-contractor was not bound to sue on each installment as it fell due, in order to maintain a mechanic's lien, but might wait until the entire debt matured. *Ibid.* 629.

12. *Limitation to enforcing sub-contractor's lien.* Section 47 of the act requiring the petition to enforce the lien created by section 29, in favor of sub-contractors, to be filed within three months from the time of performance of the sub-contract or doing the work, etc., as a limitation law, does not begin to run, in case of a contract payable in installments, until the last installment matures or the entire debt is due. *Ibid.* 629.

13. *Notice—how signed, by a corporation.* A notice given by a corporation claiming a mechanic's lien as a sub-contractor, is not insufficient because signed by the corporation, by its attorney, and not under the corporate seal. *Ibid.* 629.

**LIMITATIONS.****LACHES.**

1. *Must be pleaded.* A defendant can not assign for error the failure of the court to dismiss a bill on the ground of *laches*, when no such defense has been set up in the court below by plea or answer. *Dawson et al. v. Vickery*, 398.

**MECHANIC'S LIEN.**

2. *Contract payable in installments.* See **LIENS**, 11, 12.

**LIQUIDATED DAMAGES.**

**COVENANT CONSTRUED.** See **CONTRACTS**, 11, 12.

## LOCAL IMPROVEMENTS.

## MUNICIPAL AUTHORITIES.

1. *Powers—discretion—statute construed.* See SPECIAL ASSESSMENTS—SPECIAL TAXATION, 13 to 16.

## BENEFITS AND DAMAGES.

2. *How determined—confirmation of assessment.* See EMINENT DOMAIN, 22 to 29.

## MALPRACTICE.

## EVIDENCE.

- Facts to be considered.* See NEGLIGENCE, 35.

## MINES AND MINING.

## DOWER IN A MINE.

1. *Right to open and operate—royalty.* See DOWER, 5 to 9.

## LEASE CONSTRUED.

2. *Mine not operated—recovery of rent.* See CONTRACTS, 14, 15, 16.

## MORTGAGES AND DEEDS OF TRUST.

## LEASEHOLD INTEREST.

1. *Extent of the lien.* A mere term of years may be mortgaged, and the lien thereby created will be co-extensive with the term, and become extinguished by mere lapse of time whenever the term ends. *McCauley et al. v. Coe et al.* 311.

2. *Right of mortgagee in an option of mortgagor to purchase.* A lessee, under a lease to him of one year, had an option to purchase the demised premises, and during the term gave a deed of trust on his interest in the same. The lessee and the party secured by the trust deed did not elect to purchase during the term, and failed to exercise the option before the retraction of the same by the lessor: *Held*, that the trust deed became inoperative as a security, and was a cloud on the title of the lessor and his grantee. *Ibid.* 311.

3. *Removing, as a cloud upon the title.* Before a deed of trust given by a lessee can be declared a mere cloud upon the title of the lessor or his grantee, and removed as such, no fraud, accident or mistake being alleged, it must appear either that the deed was originally invalid, and ineffectual to convey to or vest in the trustee or his beneficiary any interest, either legal or equitable, in the property, or that by reason of some subsequent event such interest has terminated and ceased to exist, so as to render the deed no longer a valid security upon any interest or equity in the property. But if either of these facts appears, the deed of trust is only an apparent, but not a real, incumbrance, and should be removed from the title of the lessor or his grantee. *Ibid.* 311.

**MORTGAGES AND DEEDS OF TRUST.****LEASEHOLD INTEREST. Continued.**

4. *Surrender of title by lessee—effect on his mortgage.* Where the holder of a lease giving an option to purchase land mortgages his interest in the premises, his subsequent surrender and conveyance of all rights remaining in him, to the lessor, will in no manner affect the rights of the mortgagee. *McCauley et al. v. Cos et al.* 311.

**EXTINGUISHMENT OF EQUITIES.**

5. *Mortgagee's title—no better than mortgagor's.* While the trustee in a deed of trust, and his beneficiary, acquire a lien upon the legal and equitable rights held by the grantor at the time the deed was executed, they will take no rights superior to those of their grantor. The equities to which their lien attaches are subject, in their hands, to the same contingencies, and are liable to extinguishment in the same manner, they would have been if they had remained unincumbered in the hands of the mortgagor. *Ibid.* 311.

**FORECLOSURE.**

6. *Right to possession and rents after sale, until redemption expires.* The grantor in a deed of trust, or the owner of the equity of redemption, is entitled to the possession of the premises, and to receive the rents, issues and profits, after the sale on foreclosure, and until the time of redemption expires. *Davis v. Dale*, 239.

7. *Appointment of receiver.* The only purpose of appointing a receiver at the instance of the mortgagee or *cestui que trust*, or trustee in a trust deed, is to preserve the security of the mortgage or trust deed, and apply the rents, issues and profits, when necessary, in discharge of the indebtedness. *Ibid.* 239.

8. *Continuing receiver after sale.* It follows, that when the mortgaged premises are bid off at a foreclosure sale for the full amount of the decree, interest and costs, the necessity for continuing the receiver ceases, and he should be discharged, and the possession restored to the owner of the equity of redemption. In any event, the possession of the receiver, and his receipt of the rents and profits arising from the property, would be for the benefit of the person entitled to the same. *Ibid.* 239.

9. *Sale—rights of purchaser.* By law, the purchaser at foreclosure sale becomes entitled to all the right, title and interest of the mortgagor in the premises, if no redemption is made in the time and manner prescribed by the statute, and takes the estate charged with all the infirmities of title, and subject to all prior liens, to which it would have been subject in the hands of the mortgagor. *Ibid.* 239.

10. Such purchaser is bound to know that the mortgagor is entitled to the possession and rents, issues and profits of the premises

MORTGAGES AND DEEDS OF TRUST. FORECLOSURE. *Continued.*

pending the running of the period of redemption, and that taxes will accrue which will be a lien upon the property before the time of redemption will expire. *Davis v. Dale*, 239.

11. *Lien discharged by sale.* By virtue of the lien created, the mortgagee or *cestui que trust* has the right to have the security foreclosed and the property sold, and the proceeds applied in payment of the secured debt. But when this is done, and the lien enforced by a sale of the property and the proceeds applied, the mortgage or trust deed has expended its force, and the property is no longer subject to its provisions. *Ibid.* 239.

12. Nor does it in any way affect the result that the holder of the indebtedness becomes the purchaser at the sale, whether he be the mortgagee or *cestui que trust*, or not. By becoming the purchaser a new relation created by the statute exists, in nowise dependent upon any privity of contract between the purchaser and mortgagor. *Ibid.* 239.

## CONVEYANCE OF PROPERTY TO MORTGAGEE.

13. *Subsequent assignment of note and mortgage—whether a revival of the mortgage.* Where a mortgagor conveys the mortgaged premises to the mortgagee in payment of the debt, the lien of the mortgage will thereby be extinguished, or at least merged in the fee, and an assignment of the note and mortgage by the mortgagee, even for a valuable consideration, will not so far revive and give renewed vitality to the lien as to enable the assignee to enforce it by foreclosure. *Gage v. McDermid*, 598.

14. One W. gave his note of \$5300 to M., secured by a mortgage containing a power of sale. W., becoming insolvent, conveyed the mortgaged premises to M. in payment of the debt, but the latter neglected to surrender the note and mortgage. Twelve years thereafter, being indebted to a bank in the sum of \$5100, M. gave to the president of the bank his note of \$6000, secured by a deed of trust as collateral security, and instead of entering satisfaction of the old mortgage, assigned the same to the president of the bank, covenanting in the assignment that there was due under the mortgage not less than \$5300, and that he had a good right to assign the same, there being no consideration for such assignment, and delivered the same, as further collateral security for his debt, to the bank. The bank sold the \$6000 note and delivered the collateral to G., who foreclosed the deed of trust, and the brother of G. became the purchaser of the property for the amount due on the \$6000 note and costs, from which sale M. redeemed. G. thereupon foreclosed the mortgage of W. to M. by a sale of the property, and the brother of G. became the purchaser, having knowledge of the facts: *Held*, that the brother of G. was not a *bona fide* purchaser as against

**MORTGAGES AND DEEDS OF TRUST.****CONVEYANCE OF PROPERTY TO MORTGAGEE. Continued.**

M., and that the sale under the mortgage was wrongfully made, and that the deed made on the second sale should be set aside as a cloud on his title. *Gage v. McDermid*, 598.

**ASSIGNMENT.**

15. *Whether without consideration.* M., being indebted to W. in the sum of \$5100, gave his note to W. in the sum of \$6000, secured by a deed of trust on certain lots, as collateral security, when it was discovered that a mortgage given to M. on the lots was not satisfied of record, though, in fact, it had been paid by a conveyance of the lots to M. by the mortgagor. Instead of satisfying the mortgage of record, and for the purpose of perfecting the title to the property, M. made an assignment of such mortgage to W., without any change in the original agreement: *Held*, that the assignment, being without any new consideration, was a mere gratuity. *Ibid.* 598.

16. But where the assignor, in such case, made a covenant in the assignment as to the sum due under the mortgage, and of his right to make the same, it was *held*, the utmost that could be claimed was, that the assignee acquired, by the assignment, a right to hold the mortgage, as against the assignor, as a further security for the same indebtedness which the deed of trust was given to secure, and that on its satisfaction by foreclosure sale and redemption, the assignor was entitled to a return of the note and mortgage so assigned, and that the assignee, or one succeeding to his rights, with notice of the facts, had no right to foreclose such mortgage as against the assignor. *Ibid.* 598.

**PREFERRING CREDITORS.**

17. *Of their validity.* See **INSOLVENT DEBTORS**, 8.

**REDEMPTION.**

18. *Payment of taxes and assessments.* See **REDEMPTION**, 1.

**MUNICIPAL CORPORATIONS.****STREET CROSSINGS.**

1. *Duty of city to keep in repair.* This court is not prepared to hold that the duty of a city to keep its street crossings in a reasonably safe condition for the use of foot-passengers arises only when it sees fit, in the exercise of its discretion, to construct an artificial crossing over the street. *City of Beardstown v. Smith*, 169.

2. Where a street crossing has been established *de facto* by public use, the city is not at liberty, merely because no artificial crossing has been constructed, to intersect the crossing which the public have established for themselves, with dangerous ditches and pit-falls. *Ibid.* 169.

MUNICIPAL CORPORATIONS. STREET CROSSINGS. *Continued.*

3. *Cutting ditch across traveled pathway.* Where no sidewalk is made along a street, but there is a well-defined path along the side of such street, used by the public, and the city causes a ditch or drain to be dug in a cross-street intersecting such traveled pathway, it will become the duty of the city to keep the crossing of such path in a reasonably safe condition and repair for the use of pedestrians, in order to escape liability to one injured while attempting to cross the same. *City of Beardstown v. Smith*, 169.

4. While a city may, perhaps, not be chargeable with negligence for omitting to make a proper crossing of a street, yet if it sees fit to construct a ditch in the street it will be bound to use reasonable care to so construct and maintain it as to make it reasonably safe, in view of such uses as were being actually made of the street. *Ibid.* 169.

5. *Degree of care required of persons using the same.* In an action against a city to recover for a personal injury from a defective or unsafe street crossing, an instruction for the plaintiff, merely holding that a person passing over a sidewalk or street is not bound to use more than reasonable care and caution in respect to his own safety, does not require of the plaintiff a lower degree of care and diligence than the law prescribes, and is not erroneous. *Ibid.* 169.

## ANNEXATION OF TERRITORY.

6. *A question of policy.* Whether the boundaries of a city or village should be enlarged or contracted by the annexation or detaching of territory is not a question of law or fact for judicial determination, but purely a question of policy, to be determined by the legislative department. *Whittaker et al. v. Village of Venice et al.* 195.

7. *Conditions to annexation of territory.* The conditions on which territory may be annexed to a village are: A petition in writing therefor, signed by three-fourths of the voters, and the owners of three-fourths (in value) of the property, etc., and that the territory to be annexed shall be contiguous to the village, and not embraced within its limits. When these facts exist, the board may, by ordinance, annex the territory, which ordinance is to be recorded. The legislature has not invested the board of trustees with any discretionary power to determine whether the annexation is expedient or not. *Ibid.* 195.

8. *Whether reviewable on certiorari.* The village board is authorized to find the facts that the territory is contiguous to the village, and that the petition is signed by the proper number of voters and owners. But the decision upon these preliminary questions of fact can not be reviewed on *certiorari*. *Ibid.* 195.



MUNICIPAL CORPORATIONS. *Continued.*

## SEWERS.

9. *Discharging sewage into a stream—injunction.* See NUISANCE, 1 to 6.

## PUBLIC SQUARE.

10. *Title by dedication.* See DEDICATION, 2, 3.

## WATER AND GAS PIPES.

11. *Laying under the street—stand-pipe in a street.* See HIGHWAYS, 12, 13, 14.

## DRAINAGE DISTRICT.

12. *Including territory in a city or village.* See DRAINAGE LAW, 1, 2, 3.

## LOCAL IMPROVEMENTS.

13. *Discretion of city council.* See SPECIAL ASSESSMENTS—SPECIAL TAXATION, 13, 14.

## ORGANIZATION.

14. *Form of ballot.* See ELECTIONS, 1.

## NEGLIGENCE.

## JOINT ACTION.

1. *Liability growing out of joint negligence.* Where an injury is the result of the joint operation of the negligence of several parties, either party thus negligent may be made answerable for the entire injury. All who contribute to a tort are liable to the person injured, each for the entire damage, and it can not be apportioned. *Lake Erie and Western Railroad Co. v. Middlecoff et al.* 27.

## CONTRIBUTORY NEGLIGENCE.

2. *What constitutes.* Contributory negligence is nothing more or less than negligence on the part of the plaintiff, and the rules of law applicable to negligence in a defendant are applicable thereto. In general, the question of negligence is one of fact. Hence an instruction is properly refused which tells the jury, as a matter of law, that certain facts *per se* constitute negligence. Knowledge of a defect in a sidewalk by a person injured, before he goes upon the same, or before the injury, does not *per se* establish negligence on his part. *Village of Clayton v. Brooks*, 97.

3. While one may voluntarily and unnecessarily expose himself or his property to danger without thereby becoming guilty of contributory negligence, as a matter of law, yet it is an established rule that when one does knowingly put himself or his property in danger there is a presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such a course of conduct. But knowledge in this respect does not necessarily constitute contributory negligence. One may exercise due care with full knowl-

NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. *Continued.*

edge of the danger to which he is exposed or to which he may lawfully expose himself. *Village of Clayton v. Brooks*, 97.

4. The mere fact that a traveler is familiar with a road or sidewalk, and knows of a defect therein, will not impose on him the duty to exercise more than ordinary care in avoiding it. Such knowledge is a circumstance, but it should be submitted with the other facts of the case, to a jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury. But the mere fact that the obstructed or defective street was out of the way of the point at which the traveler was arriving, or that he might have taken a nearer way, is immaterial, as it is the duty of the town to repair all of its sidewalks. *Ibid.* 97.

5. *Notice of danger—evidence of negligence.* The exposure of person or property to injury with knowledge of the danger to which the same is exposed, is evidence of negligence, as a matter of fact. Therefore, if a person attempts to pass over a sidewalk, bridge or other structure, knowing the same to be in a dangerous condition, and in such attempt receives injury, his knowledge of the danger will presumptively establish contributory negligence. But such presumption is not conclusive. It may be rebutted by evidence of the exercise of ordinary care under the circumstances of the particular case. *Ibid.* 97.

6. Contributory negligence is not shown by proof that after knowing the condition of the street the plaintiff traveled on it after dark; and the fact that a traveler on a highway perceives that an obstacle therein is dangerous to persons attempting to pass it, is not conclusive that he does not use care in making the attempt. Nor does the mere fact that the plaintiff might have taken better and safer sidewalks than the one he did take, charge him with want of ordinary care. *Ibid.* 97.

7. In an action against a village for a personal injury resulting from a hole in a sidewalk, one of the ultimate facts for the jury is, was the plaintiff guilty of contributory negligence. And the fact that he or she returned home in the night time over the defective sidewalk, with knowledge of its unsafe condition, is a circumstance proper to be shown, as tending to establish such negligence. It is an evidentiary fact proper to go to the jury, as having a tendency to prove the ultimate fact in question. *Ibid.* 97.

8. *Degree of care required of plaintiff.* In an action based on negligence, to recover for a personal injury, the defendant asked and the court refused an instruction, that "if the jury find, from the evidence, that the plaintiff was guilty of any negligence, how-

**GLIGENCE. CONTRIBUTORY NEGLIGENCE. Continued.**

ever slight, which contributed to the alleged injury complained of, then the jury must find for the defendant, unless the jury further find, from the evidence, that the defendant was guilty of negligence, which, in comparison with the plaintiff's, was gross." *Held*, clearly erroneous, as requiring proof that the plaintiff was in the exercise of the highest degree of care. *City of Beardstown v. Smith*, 169.

9. A person injured by the negligence of another can not recover therefor, unless he, at the time, was in the exercise of reasonable and ordinary care for his own safety. *Ibid.* 169.

10. *Failure to look for a train at a railroad crossing.* The fact that a person, in attempting to cross a railroad track at a highway crossing, fails to look and listen to see if any train is coming on the track, are facts proper for the jury to consider in determining whether such person has been negligent; but it can not be said, as a matter of law, that the failure to observe such acts is negligence. *Partlow v. Illinois Central Railroad Co.* 321.

11. *When the negligence of plaintiff is immaterial.* Where the jury, in response to special interrogatories, find that the railroad company was guilty of no negligence or want of care which contributed to the accident, it is immaterial whether the person injured was guilty of negligence in failing to look and listen for the train. *Ibid.* 321.

12. *Question of fact.* Whether the attempt of the plaintiff's intestate to cross a railroad track at a street intersection while an engine was approaching was negligent, depends upon the circumstances shown by the evidence, such as, the apparent distance from her of the approaching engine, the speed at which it seemed to be running, and her right to rely upon the probability that its speed would not exceed that allowed by ordinance. These are all facts, or matters of law and fact combined, and the question whether she was guilty of contributory negligence is, therefore, a question for the jury. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Baddeley*, 328.

13. *Whether proven.* The failure of a miner, while moving a car in a dark, low and narrow passage of a coal mine, having no other light than a lamp carried by him, to discover such a grade in the track upon which the car was standing as would cause the car to run of its own momentum, without having his attention previously called to the grade, does not raise any implication of negligence on the part of the miner, so as to defeat a recovery by him for a personal injury. On the contrary, the failure to make such discovery may be entirely consistent with the exercise of ordinary care. *Consolidated Coal Co. v. Bruce*, 449.

**NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. Continued.**

14. *A question for the jury.* Where a plaintiff, in his testimony, fully details the circumstances attending his injury, the question, whether he was in the exercise of due care or not, depends wholly upon the construction and force to be given to his evidence. It is a mere question of fact for the jury whether the plaintiff was guilty of negligence. *Consolidated Coal Co. v. Bruce*, 449.

15. *Limiting plaintiff's negligence to exact time of injury.* Where a party is injured by a moving train of cars while upon or attempting to cross railroad tracks, it is error to limit the requirement that he should be in the exercise of ordinary care, to the exact time of the injury. The question whether he exercised ordinary care in going upon the track is always necessarily implied. *Lake Shore and Michigan Southern Railway Co. v. Hessions*, 546.

16. *Slight negligence* is not necessarily incompatible with due and ordinary care, hence an instruction requiring the jury to believe, from the evidence, that the plaintiff's intestate was in the exercise of ordinary care for his own safety, and that injury resulted from the negligence of the defendant, is not erroneous. *Ibid.* 546.

**COMPARATIVE.**

17. *Ordinary care of person injured.* If, since the more recent decisions of this court, the doctrine of comparative negligence can be said to have any further place in our system of jurisprudence, it is very clear that no plaintiff can recover upon the ground of mere negligence, who was not himself, at the time of the injury complained of, in the exercise of ordinary care. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Baddeley*, 328.

18. *Doctrine renounced.* The doctrine of comparative negligence, as announced in the earlier cases, is no longer the law of this State. The doctrine announced in the later decisions requires as a condition to a recovery by the plaintiff, that the person injured be found in the exercise of ordinary care for his own safety, and that the injury result from the negligence of the defendant. *Lake Shore and Michigan Southern Railway Co. v. Hessions*, 546.

**CAUSING DEATH.**

19. *Evidence supporting a recovery.* In an action by an administrator against a railroad company to recover damages from alleged negligence resulting in the death of plaintiff's intestate, it must appear, from the evidence, that the defendant was guilty of negligence as charged in the declaration, and that the deceased was in the exercise of ordinary care at the time, to entitle the plaintiff to recover. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Baddeley*, 328.

20. *Action by surviving husband—measure of damages.* In an action by an administrator against a railway company to recover

**GLIGENCE. CAUSING DEATH. Continued.**

compensation for the death of his intestate, the court instructed the jury, that if they found for the plaintiff they should assess his damages at what they believe, from the evidence, to be a proper pecuniary compensation for damages to her surviving husband and next of kin, etc. The statute gives the action in favor of the husband as well as the wife. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Baddeley*, 328.

21. *Survivorship of widow or next of kin.* The statute giving a right of action for wrongfully causing the death of another, is exclusively for the benefit of the widow and next of kin of the deceased. The fact of survivorship of a widow or next of kin is an essential element of the cause of action, and it is therefore indispensable that it shall be alleged and proved. *Lake Shore and Michigan Southern Railway Co. v. Hessions*, 546.

**PERSONAL INJURY.**

22. *Measure of damages.* In an action for a personal injury, when the only special damages claimed in the declaration cover only the hindrance to the plaintiff's business and expenses in being cured, evidence of what she could have made by a special arrangement to go into the business of dressmaking, is not admissible. *City of Beardstown v. Smith*, 169.

23. To show the ability and capability of the plaintiff to labor and carry on business, in order to ascertain what is a fair compensation for its prevention, is to show the reasonable value of her labor in her business. When it is of a kind that is paid in wages, the usual amount per day, week or month is easily ascertainable as a fact; but in another case it is a matter of opinion, and opinion is as competent evidence in such cases as is knowledge in the others. *Ibid.* 169.

**WANTON AND WILLFUL.**

24. *Ill-will immaterial.* If the servants of a railway company, at the time a plaintiff was injured, were running its engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, and where many persons were likely to be passing, such acts will be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount, in law, to wanton and willful negligence; and it will not be necessary, in order to raise such an inference, to prove that the defendant's servants were actuated by ill-will directed specifically to the plaintiff, or to have known that he was in such a position as to be likely to be injured. *East St. Louis Connecting Railway Co. v. O'Hara*, 580.

**A QUESTION OF FACT.**

25. An instruction, in an action by the plaintiff against a railroad company, which makes the mere fact that the plaintiff, at the

NEGLIGENCE. A QUESTION OF FACT. *Continued.*

time he was injured, was lying upon the defendant's track outside of the limits of the street, proof of negligence *per se*, so as to constitute, in law, a conclusive bar to his recovery, is clearly erroneous. *East St. Louis Connecting Railway Co. v. O'Hara*, 580.

26. While the plaintiff's lying upon the railroad track would, unexplained, be very cogent evidence of negligence, the question would, after all, be a question of fact for the jury, since his being in that position may have resulted from various supposable causes not inconsistent with the exercise of reasonable care on his part. *Ibid.* 580.

SPEED OF TRAINS.

27. "*Cars*" includes locomotive engines. An ordinance of a city providing that no railroad company shall run any passenger train or cars within the city limits at a greater rate of speed than ten miles an hour, nor any freight train or car at a greater rate of speed than six miles an hour, is broad enough to include any and all vehicles on wheels, and embraces locomotive engines, which are a species of "cars." *Ibid.* 580.

28. *Right to regulate.* See RAILROADS, 6 to 9.

OF RAILROAD COMPANY.

29. *Escape of fire from locomotive—ordinance as to speed of train.* In an action against a railway company for an injury caused in a city by the escape of fire from the locomotive, an ordinance limiting the speed of passenger trains within the city to ten miles an hour is properly admissible for the plaintiff, when one count sets out such ordinance, and that by reason of such excessive rate of speed the sparks were thrown from the engine which set fire to the plaintiff's property, especially when there is evidence tending to show that a high rate of speed is more likely to result in the emission of sparks or coals from the engine. *Lake Erie and Western Railroad Co. v. Middlecoff et al.* 27.

30. *When no injury results.* In an action against a railway company for an injury caused by the escape of fire from an engine while passing through a street on a side-track, the court admitted in evidence the ordinance giving the right of way in the street, which ordinance required the company to make and keep in repair a good and sufficient wagon road on each side of its track: *Held*, that as it was not claimed the injury resulted from the failure to keep in repair a wagon road, the admission of the ordinance, if an error, was harmless. *Ibid.* 27.

31. *Escape of fire from engine passing through a city.* If the negligence of a city in allowing grass and weeds to accumulate in a street upon which a railway line is located, is not of such a character as to render it liable for the destruction of adjacent property

**GLIGENCE. OF RAILROAD COMPANY. Continued.**

by fire from the railway engines, this will in no degree lessen the liability of the railway company for communicating fire to the grass and weeds, from which it spreads and destroys property. *Lake Erie and Western Railroad Co. v. Middlecoff et al.* 27.

32. *Proof of unsafe condition of engine.* In an action against a railway company to recover for injury by the escape of fire from an engine, the defendant introduced evidence tending to show that the engine was in good repair and was furnished with a suitable spark arrester; that it had been recently examined and found in good order, and that it was under the control of a competent engineer, and was being carefully operated: *Held*, on rebuttal it was admissible for the plaintiff to show that on the same day the plaintiff's property was burned, several other fires were set from sparks emitted by the same engine, within a few miles of where the first fire was set. *Ibid.* 27.

33. *Contributory negligence of plaintiff—failure to keep land free from combustible materials.* In such an action the court instructed, in behalf of the plaintiffs, that it was not negligence on the part of the plaintiffs, as owners of the property in question, that they had used their land or property in the same manner, or permitted it to be and remain in the same condition, in which it would have been used or would have remained had no railroad passed near it: *Held*, that there is no material objection to the instruction. *Ibid.* 27.

34. *In transporting a locomotive—for another railroad company.* See RAILROADS, 12.

**MALPRACTICE.**

35. *Facts to be considered.* In an action for malpractice in the treatment of a broken bone in the plaintiff's wrist, the condition of the arm at the time of the injury, the manner of treatment by the defendants, the length of time the bandages and splints were permitted to remain, and whether complaint was made by the plaintiff of severe pain in the hand whilst such bandages were so kept on, are all facts, and in determining them the jury should take into consideration the opportunities of the several witnesses for ascertaining from their own personal knowledge, and whether there was proper diligence and care in the treatment was not to be determined from that alone, but those facts must be weighed in connection with all the evidence, facts and circumstances,—that is to say, the expert evidence,—and the jury should determine, from all the evidence and circumstances, whether the defendants were negligent. *Mitchell et al. v. Hindman*, 538.

## NEW TRIALS.

## NEWLY DISCOVERED EVIDENCE.

1. *Cumulative and impeaching evidence.* As a general rule, new trials are not allowed to enable the production of newly discovered evidence which is merely cumulative, and in the nature of impeaching evidence. *Jacobson v. Gunzburg*, 135.

## IMPROPER CONDUCT OF PARTIES.

2. *Conversation of a party to the suit, with a juror.* During the trial of a suit, and as the court took a recess for dinner, the plaintiff and one of the jurors walked together part of the way from the court house to the hotel, where both were boarding, and while so walking, engaged in a conversation. It was shown that the distance between the court house and hotel was but a few steps, and that the juror's overtaking the plaintiff was purely accidental, and that nothing was said between them in relation to the suit: *Held*, that while this conduct was improper, it was not sufficient ground for a new trial. *City of Beardstown v. Smith*, 169.

3. *Tampering with the jury.* See PRACTICE, 21 to 24.

## MOTION FOR NEW TRIAL.

4. *Waiver of statement of reasons in writing.* Where a motion for a new trial is submitted without any statement in writing of the grounds therefor, without objection, such statement will be treated as waived, and the want of it can not be urged in an appellate court. *Bromley v. People*, 297.
5. *Overruling motion—preserving exceptions.* It is sufficient if the bill of exceptions shows a motion for a new trial was made and overruled, and an exception taken. In such case, the court to which the record is taken on appeal or writ of error can consider the propriety of refusing the motion for a new trial. *Ibid.* 297.
6. *Whether necessary—trial without a jury.* See PRACTICE, 3.
7. *Motion overruled—preserving exceptions.* See PRACTICE IN THE SUPREME COURT, 1 to 4.

## NEWBERRY LIBRARY.

## TRUSTEES UNDER THE WILL.

1. *Powers—limitations of the will.* The trustees under the Newberry will had two things to do, viz., to manage and to distribute the estate. When the appointed time for distribution came, and the estate was distributed, their functions as trustees of the will ceased, and the distributees took an absolute ownership, free of any control of the trustees. So, too, the share to be applied for the founding of a free public library, when so applied, was to belong absolutely to such library, freed from all control of the trustees appointed by the will. *Attorney General v. Newberry Library*, 229.



**EWBERRY LIBRARY. TRUSTEES UNDER THE WILL. Continued.**

2. The limitation of the powers by the Newberry will as to the time the trustees might lease property and as to investments and the securities taken on loans, has nothing to do with any portion of the estate devised after its distribution by the trustees. *Attorney General v. Newberry Library*, 229.

**LIBRARY ACT.**

3. *Construed—effect on trustees under the Newberry will.* Section 4 of an act entitled "An act to encourage and promote the establishment of free public libraries in cities, villages and towns," approved June 17, 1891, does not add to the duties of the trustees of the Newberry will. It does make the clause of the will providing for the founding of a free public library a part of the law of the being of the Newberry Library, and such corporation can not, under section 4 of such act, transform the library into a book repository, not free, or remove it from the North Division of Chicago. But such corporation is not bound, in the management of its income, to pay heed to the restrictions put upon the trustees from whom it received the fund. *Ibid.* 229.

**NOTICE.****BY POSSESSION.**

1. *Equities in real property.* See **EJECTMENT**, 6.

**TO CORPORATION.**

2. *Notice to managing officer.* See **CORPORATIONS**, 1.

**OF VENDOR'S LIEN.**

3. *Second purchaser.* See **LIENS**, 1.

**OF MECHANIC'S LIEN.**

4. *Served by a corporation by attorney.* Same title, 13.

**NUISANCE.****POLLUTION OF A STREAM.**

1. *By the sewage of a city—preventing by injunction.* A court of equity has jurisdiction to prevent the pollution of the water in a stream by emptying the sewage of a city therein, whereby the water will be rendered unwholesome and unfit for use, and a private nuisance will be created in the premises of a land owner over which the stream flows. *Village of Dwight v. Hayes*, 273.

2. Where such a nuisance is shown, though causing inconsiderable damage, a court of equity will enjoin its continuance; and in deciding upon the right of a proprietor to an injunction against the creation of such a nuisance, the court will not consider the convenience of the public. The fact that a large population will be affected by the interruption of the use of a system of sewers, is

**NUISANCE. POLLUTION OF A STREAM. Continued.**

immaterial, where the rights of an individual owner are affected. *Village of Dwight v. Hayes*, 273.

3. The fact that the creek into which the sewage of a city is proposed to be emptied by a system of sewers, near the farm of the complainant, is not a running stream during all portions of the year, but during very dry weather contains only small pools or ponds of water standing in the deeper parts of its channel, will only serve to aggravate the nuisance when the complainant's land is situated but a little distance from the proposed point for the discharge of the sewage, and is crossed over by the creek. *Ibid.* 273.

4. *Parol license—revocation.* The right of a village to pollute the waters of a creek by discharging sewage into it, is in the nature of an easement, which can be created only by grant or prescription; and a mere oral consent to such pollution of the stream will vest in the village no right not in the power of the party giving the consent, at any time to revoke. Nor will the fact that the village has expended money or incurred liability on the faith of such parol license, present any obstacle to such revocation. *Ibid.* 273.

**EQUITABLE RELIEF.**

5. *Enjoining—before the right is established at law.* It is a general rule, formerly strictly enforced, that before a court of equity would interfere to restrain a private nuisance, the complainant must establish his right in a court of law. But this rule has been somewhat relaxed in modern times, and when a case is clear, so as to be free from substantial doubt as to the right to relief, and it is evident that a nuisance *per se* is sought to be created, equitable relief will be granted without first resorting to an action at law. *Ibid.* 273.

6. Where the discharge of the sewage of a village into a creek pollutes and corrupts the waters of the stream as it flows across a party's land, and thereby creates a nuisance *per se*, and there is no doubt of such party's rights, he will be entitled to an injunction restraining the creation of the threatened nuisance. *Ibid.* 273.

**OPTION CONTRACTS.** See **CONTRACTS**, 4 to 8.

**ORDINANCES.**

**AS TO SPEED OF TRAINS.**

1. *Violation—as evidence of negligence.* See **RAILROADS**, 6 to 11.

**FOR LOCAL IMPROVEMENT.**

2. *Basis of assessment—amending.* See **SPECIAL ASSESSMENTS—SPECIAL TAXATION**, 18 to 24.

**OYER.**

WHEN IT MAY BE DEMANDED. See PRACTICE, 13, 14, 15.

**PARKS.****PARK COMMISSIONERS.**

1. *Powers over parks and public squares.* The act of 1869, relating to parks, invested the park commissioners with powers, generally, at least, as full and exclusive in regard to the parks as those conferred upon and possessed by the city council of Chicago in respect to public squares and places in the city, each holding by the same kind of tenure, in relation to the respective subjects matter there referred to, the one clothed with powers identical in extent with those vested in the other. *McCormick v. South Park Comrs.* 516.

2. *Control of streets leading to parks.* Prior to the act of 1879, park commissioners were not vested with authority to acquire the management and control of public streets leading to parks. The city held the fee in the streets in trust for the public, and had no power to surrender a street to the park commissioners or other person or body. *Ibid.* 516.

3. By this act power was conferred upon park commissioners to take and accept public streets of a city connected with parks, and to assume the management and control of the same, and power was given city authorities to consent thereto, and to surrender the same to the park boards, regardless of where the fee therein might be lodged. *Ibid.* 516.

4. *Powers as to encroachments on streets.* After the park commissioners have, by the consent of the city authorities, acquired the control of streets leading to their park, they may prohibit the erection of a balcony which encroaches upon such street, and the city council will have no power to license such encroachment. *Ibid.* 516.

5. *Limit and extent of powers.* The authority of the park commissioners ceases at the line on either side of the street. As to the character, height or dimensions of buildings, or of what materials they shall be constructed, along the line of the street, they have no control; but so far as the street proper is concerned, they have the same power as is vested in them of and concerning the parks, boulevards and driveways under their control, subject only to the reservation made by the city in its ordinance giving control of the street. *Ibid.* 516.

6. As to encroachments upon the park, and obstructions or purprestures in the streets, boulevards or driveways thereof, the park commissioners are invested with power, ample and complete, to prevent and to remove the same. As to streets leading to parks

**PARKS. PARK COMMISSIONERS. Continued.**

placed in their control, they may exercise any of the powers conferred by the act of 1869, or which may be by law vested in them, of and concerning parks, boulevards or driveways under their control, so far as applicable. *McCormick v. South Park Comrs.* 516.

**PARTIES.****ATTORNEY GENERAL.**

1. *As representative of the public.* See ATTORNEY GENERAL, 1.

**JOINDER OF PARTIES.**

2. *In an action for causing intoxication.* See INTOXICATING LIQUORS, 1, 2, 3.

**IN AN ACTION FOR TORT.**

3. *Joint and several liability.* See NEGLIGENCE, 1.

**PAYMENT.****APPLICATION OF PAYMENT.**

1. *Separate debts—election as to application.* The debtor is entitled to elect on which of two debts a payment shall be credited, and it is the duty of the creditor to so apply it. But this election must be made at the time of the payment. Where the debtor pays generally, or fails to make the application when he might do so, the creditor may apply the payment to whatever debt he pleases, unless there are circumstances which would render the exercise of such discretion by him unreasonable, and unjust to the debtor. If no application is made by either party, the court will make it according to the equity and justice of the case. *Koch et al. v. Roth*, 212.

**PLAT.****DEDICATION.**

- Public square—title.* See DEDICATION, 1, 2, 3.

**PLEADING.****SEPARATE COUNTS.**

1. *Statement of same cause of action in different counts.* It is proper for the pleader to state what is in reality the same cause of action, in several counts of his declaration, the purpose being to meet the varying phases of the evidence. When this is done, the counts are to be regarded as distinct from each other, and by apt reference, or otherwise, must state a complete cause of action. *Lake Shore and Michigan Southern Railway Co. v. Hessions*, 546.

**WAIVING DEFECTS.**

2. *Defects cured by pleading to the merits.* It is the well settled doctrine that many defects which might have been fatal on de-

**LEADING. WAIVING DEFECTS. Continued.**

murrer are waived and cured by pleading to the merits. After plea filed, a declaration will receive a reasonable interpretation. *Lake Shore and Michigan Southern Railway Co. v. Hessons*, 546.

**NEGLECTENCE.**

3. *Causing death—survivorship of widow or next of kin.* The statute giving a right of action for wrongfully causing the death of another, is exclusively for the benefit of the widow and next of kin of the deceased. The fact of survivorship of a widow or next of kin is an essential element of the cause of action, and it is therefore indispensable that it shall be alleged and proved. *Ibid.* 546.

4. In an action on the case to recover damages for the death of the plaintiff's intestate through negligence, the pleader alleged, in each of seven counts, the death and negligence, and at the end of the last count alleged the survival of a widow and next of kin, whose names were stated: *Held*, that in the absence of a demurrer the allegation that the plaintiff's intestate, at his death, left the persons named, his next of kin surviving, was applicable to all the counts of the declaration. *Ibid.* 546.

5. If the same allegation had been inserted in each count, or in one, with apt reference to that count in the others, they would have severally stated a good cause of action. It would probably have been better pleading to have alleged in the first count the survival of the widow and next of kin, as one of the essential elements constituting the cause of action, and either by repeating it, or by express reference in the subsequent counts, to have made the allegation thereof a part of each subsequent count. *Ibid.* 546.

**ALLEGATIONS OF SPECIAL INJURY.**

6. *Action by lot owner against village for placing a stand-pipe in the street.* In an action by a lot holder against a village, for an injury to his property by the erection of a stand-pipe in the street, certain counts of the declaration alleged that the plaintiff's property had been depreciated in value because of the danger of the building being destroyed or damaged by the stand-pipe falling or being blown upon it, or by bursting and flooding with water, but no fact was alleged upon which the apprehension of such damages could be based: *Held*, that such counts failed to show a cause of action. *Barrows v. City of Sycamore*, 588.

7. Another count alleged that "said stand-pipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting-room in the south-west corner," etc.: *Held*, that this was a sufficient allegation of special injury to entitle the plaintiff to recover of the village. The extent of the injury is a question of fact, to be determined upon plea and trial. *Ibid.* 588.

PLEADING. *Continued.*

## IN CHANCERY.

8. *Cross-bill—germane to original bill.* See CHANCERY, 6, 7.

## PLEA OF RELEASE OF ERRORS.

9. *In the Supreme Court—bad on demurrer.* See PRACTICE IN THE SUPREME COURT, 9.

## PLEADING AND EVIDENCE.

## VARIANCE.

1. *As to one count—whether applied to other counts.* In an action against a railway company to recover for the loss of buildings by fire, one count described the buildings as situate on a certain block, while the proof showed that the building extended some four feet over into the street: *Held*, that such variance did not apply to the other counts, and a recovery might be sustained under them. *Lake Erie and Western Railroad Co. v. Middlecoff et al.* 27.
2. *Obviated by stipulation.* Where, at the beginning of the trial, it is admitted by both parties that the property injured fronts on a certain street and is situated on a certain block of a city, the parties can not be allowed to insist that the property is situated otherwise than as thus admitted, and thus defeat a recovery for an injury thereto. *Ibid.* 27.

## DECLARATION.

3. *Whether it charges a criminal act.* An amended declaration charged that the defendant "wrongfully took" and "unlawfully destroyed" the notes upon which he was sued, but did not charge that the act was fraudulently and maliciously done, with intent to defraud: *Held*, that the declaration did not charge any criminal offense, and that it was not necessary to maintain the cause of action to prove the defendant guilty of a criminal offense. *Grimes v. Hilliary*, 141.

## ACTION FOR ROYALTY.

4. *Under a mining lease.* In an action upon the covenant in a mining lease to pay to the lessor a royalty on coal mined, not less than \$1200, it is not necessary to allege in the declaration that there was minable coal that the defendant ought to have taken out, in the absence of any covenant on the part of the lessor as to the extent of the coal in the land leased. In such case, if there was any fact in existence which would be a bar to the action, the burden is on the lessee or his assignee to plead and prove it. *Consolidated Coal Co. v. Peers et al.* 344.

## CONTRACT FOR PAYMENT IN INSTALLMENTS.

5. *Declaring upon several installments, in one count.* Any number of installments due upon an instrument in suit may be declared for and recovered upon in one and the same count. *Ibid.* 344.

**OSSESSION.****OF REAL ESTATE.**

*Notice of equities.* See **EJECTMENT**, 6.

**RACTICE.****CORRECTING ERROR.**

1. *Excluding evidence after its admission.* While it is true a court has no right to admit improper evidence, yet when that has been inadvertently done, and the court, as soon as the mistake is discovered, promptly rules out the evidence, a judgment ought not, as a general rule, to be reversed for such an error. *Simons v. People*, 66.

**OBTAINING EVIDENCE.**

2. *Compelling witness to appear—party must take proper steps.* The record showed that on the trial of one for murder, a witness who had testified for the People, being called for the defendant, did not appear. The record failed to show that the witness had been subpoenaed, that an attachment had been asked or denied, or that the court was requested to take any action to compel the attendance of the witness: *Held*, that there was no ground of complaint shown, to the action of the court. *Ibid.* 66.

**TRIAL WITHOUT A JURY.**

3. *Motion for new trial—whether necessary.* Where a jury is waived, and a cause is tried by the court alone, no motion for a new trial is required. If the bill of exceptions shows that the defendants excepted to the judgment rendered by the court in favor of the plaintiff, this is all that is required to entitle them to review the judgment on appeal or writ of error. *Sands et al. v. Kagey*, 109.

**MOTION TO EXCLUDE EVIDENCE.**

4. *When properly overruled.* A motion by the defendant to exclude all of the plaintiff's evidence is properly overruled when such evidence tends to establish plaintiff's right of recovery under amended counts filed by leave of court. *Grimes v. Hilliary*, 141.

5. *Introduction of evidence—failure to renew motion.* If a defendant, after the refusal of the court to exclude all the plaintiff's evidence, introduces evidence and proceeds with the trial, and does not thereafter renew his motion, he will waive the right to insist upon his motion, or assign the refusal of the motion for error. *Ibid.* 141.

**LIMITING APPLICATION OF EVIDENCE.**

6. *Failure to ask instructions.* Where a bill of discovery in aid of a suit at law, and the answer thereto, are read in evidence by the plaintiff, it is the duty of the court to limit the use to be made of the bill; but if the other party fails to ask any instructions or ruling of the court limiting it, he can not complain on appeal or error. *Ibid.* 141.

**PRACTICE. Continued.****INSTRUCTIONS.**

7. *Directing what the verdict shall be.* Where there is evidence tending to show a plaintiff's right to recover, or to justify, as well as require, a submission of the case to the jury, a request of the defendant that the jury be peremptorily instructed to find a verdict for the defendant should be refused. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Baddeley*, 328.

**SPECIAL FINDING.**

8. *Precluding recovery on general verdict.* In an action against a manufacturing corporation to recover for a personal injury resulting from negligence, the jury found for the plaintiff, and in response to the question, "Could the plaintiff, by reasonable attention or the exercise of ordinary prudence, have known that it was dangerous to use a stick in the machine in the manner testified to by himself," answered "Yes:" *Held*, that while this finding tended to establish the fact that the plaintiff failed to exercise ordinary care, it was not conclusive, and that there may have been other evidence tending to relieve the plaintiff's act of such negligence as to preclude a recovery. *Barnes v. Rembars*, 192.

9. *Presumption in favor of general verdict.* All reasonable presumptions will be entertained in favor of the general verdict, while nothing will be presumed in aid of the special findings of fact. The inconsistency between the general verdict and the special findings must be irreconcilable, so as to be incapable of being removed by any evidence admissible under the issues, to warrant the court to set aside the general verdict. *Ibid.* 192.

**TIME TO OBJECT.**

10. *Suing jointly—waiver of error by pleading to the action.* Where each of several parties plaintiff has a right of action against a defendant, of the same nature, growing out of the same wrong, even if no joint suit is given by the statute, and the defendant elects to plead to the action so brought, and suffers a verdict and judgment to go against him, he will thereby waive the error. *Helmuth et al. v. Bell et al.* 263.

11. *Waiver of objection by failure to make it in time.* An objection which could have been removed in the trial court if made there, can not be urged for the first time in an appellate court. *Ibid.* 263.

12. If there is any ground of objection to a lease given in evidence, the party should make such objection in the trial court, and if overruled, take an exception, and failing to do so he can not make the objection for the first time in a court of review. *Consolidated Coal Co. v. Peers et al.* 344.



PRACTICE. *Continued.*

## OYER.

13. *When it may be demanded.* At common law, in suits upon sealed instruments of which it was necessary to make profert, the defendant might demand oyer, and thereby have an inspection of the instrument sued on. But this was limited to contracts or other instruments under seal. By section 20, chapter 110, of the statute relating to practice, this rule is extended to all instruments declared on, whether under seal or not. *Lester v. People*, 408.

14. Oyer or inspection is confined to instruments in writing declared upon, and constituting the cause of action, or set up in a plea by way of defense. It does not apply where the deed is stated as mere inducement. The common law also furnished another mode which was not confined to instruments under seal, which was, by application, pending the action, to the equitable jurisdiction of the court for an order to inspect. *Ibid.* 408.

15. The order for inspection was obtainable only in a very limited number of cases, as, where one party could be considered as holding a document as agent or trustee of the party seeking inspection, or where the applicant was a party to a written contract of which but one part is executed, or where one part had been lost or destroyed; and it was also, in general, considered as necessary that the party applying should be a party to the instrument which he sought to inspect. *Ibid.* 408.

## VIEW BY JURY.

16. *When allowed.* At common law a personal view of premises was not granted as a matter of right, but the power rested in the sound discretion of the court, to be exercised whenever, in the nature of the case, it became necessary or important to a clearer understanding of the issues, and to enable the jury to properly apply the evidence. *Vane et al. v. City of Evanston*, 616.

17. The design of the practice of allowing a view by the jury was to enable them better to understand the matter in controversy between the parties; and it was not confined to real actions, but was allowed in several personal actions for an injury to real estate, as, trespass *quare clausum fregit*, trespass on the case, and nuisance. *Ibid.* 616.

18. At common law, as the same was adopted in this State, the view was allowed, or not, as the judge or court determined, in his or its discretion, that the view was proper or necessary to enable the jury better to understand and apply the evidence introduced on the trial. The effect of the view may be controlled by an instruction to the jury. *Ibid.* 616.

**PRACTICE. Continued.****IMPROPER REMARKS OF COUNSEL.**

19. *In the hearing of the jury—waiver of objections.* If improper remarks are made by counsel in the presence of the jury, the attention of the court should be called to them in apt time, so as to enable the court to take proper action. If the court, upon objection being made, fails or refuses to make the proper order, the question should be saved and presented for review, otherwise the party will be deemed to have waived his objection. *Vane et al. v. City of Evanston*, 616.

**ARGUMENT TO THE JURY.**

20. *Charging a witness with perjury and with being bribed.* On the trial of a case, a witness who had testified for the plaintiff was afterward put upon the stand by the defendant, when he gave evidence damaging to the plaintiff, and much of his testimony given for the defendant was disputed by other evidence. The plaintiff's counsel, in his closing address to the jury, said that the witness had committed perjury, and had been bribed: *Held*, no error in the court's refusal to direct the counsel to refrain from such remarks, and that counsel, in his argument, might draw any proper and legitimate inferences arising from all the evidence in the case. *East St. Louis Connecting Railway Co. v. O'Hara*, 580.

**TAMPERING WITH THE JURY.**

21. *Ground for a new trial.* Tampering with the jury by the successful party litigant, or doing any act out of the presence of the court which would have a tendency to bias or prejudice them in the consideration of the cause, will ordinarily afford sufficient ground for granting a new trial. *Vane et al. v. City of Evanston*, 616.

• 22. The parties, during the separation of the jury, are not permitted to show them unusual civilities and attentions, and such attentions practiced by the successful party, his counsel or partisans, and which excite suspicion as to the motives of the party or the effect upon the jury, will ordinarily afford sufficient ground for the granting of a new trial. And furnishing the jurors with refreshments, and the like, the extension to and acceptance by them of gratuities, or, indeed, any other approach to the jury casting suspicion that they have been tampered with or that their verdict has been improperly influenced, not satisfactorily explained, will ordinarily avoid the verdict, whether there was any actual intent or design to influence them or not. *Ibid.* 616.

23. It does not, however, follow, that customary offers of civilities, or ordinary hospitality or courtesy extended by the successful litigant, when not designed or calculated to influence the juror or jurors in their consideration of the case, and which are devoid of

**PRACTICE. TAMPERING WITH THE JURY. *Continued.***

suspicion, will afford sufficient ground for setting the verdict aside. *Vane et al. v. City of Evanston*, 616.

24. In a proceeding to confirm a special assessment by a city, while the jury were out of court, viewing the property assessed, they were furnished a free lunch by the attorney for the city. It appeared that the lunch was given on the suggestion of the court, before the jury went out. It was not shown that the jury, or any of them, knew, before they were finally discharged, that the lunch had been provided at the expense of the city: *Held*, that the case was not such as to vitiate a verdict in favor of the city. *Ibid.* 616.

**MOTION FOR NEW TRIAL.**

25. *Waiver of statement of reasons in writing.* See **NEW TRIALS**, 4.

26. *Overruled—preserving exceptions.* Same title, 5.

**MOTION FOR CONTINUANCE.**

27. *Supporting by affidavit.* See **CONTINUANCE**, 1.

**IMPEACHMENT OF A WITNESS.**

28. *By the party calling him.* See **WITNESSES**, 1.

**SEIZURE OF BOOKS AND PAPERS.**

29. *To be used as evidence—constitutional prohibition.* See **EVIDENCE**, 15 to 18.

**PRACTICE IN THE SUPREME COURT.****MATTERS TO BE CONSIDERED.**

1. *Exceptions not preserved in the record.* Where no exception is preserved to the ruling of the court in the giving, refusing or modifying of instructions, or in overruling the motion for a new trial, the assignments of error questioning such rulings will not be before this court for consideration. *East St. Louis Electric Railway Co. v. Stout*, 9.

2. *Exceptions construed.* The language of a bill of exceptions was as follows: "But the court overruled the motion" (for new trial) "and rendered judgment in accordance with the finding of the jury, to the rendition of which judgment the defendant then and there excepted:" *Held*, that the exception did not embrace the ruling on the motion for a new trial, but expressly limited the exception to the entry of the final judgment. *Ibid.* 9.

3. *Overruling motion for new trial—assigning error.* The statute (sec. 61, chap. 110,) gives the right to assign error upon the decision of the court overruling motion for new trial, only in case the party has excepted to such decision. *Ibid.* 9.

4. *Failure to assign cross-errors.* Where a defendant in error, or an appellee, does not assign cross-errors, he can not question

## PRACTICE IN THE SUPREME COURT.

MATTERS TO BE CONSIDERED. *Continued.*

the correctness of the ruling of the trial court in allowing the appellant to testify in a chancery case. *Protart et al. v. Harris et al.* 40.

5. *When competency of evidence becomes immaterial.* This court will not determine the competency of evidence which was not considered by the chancellor, when it can not change the result if treated as proper evidence. *Ibid.* 40.

6. *Objections not raised in trial court—coming too late.* The rules of practice will not justify the reversal of a judgment upon a ground not suggested in the trial court, and raised in this court for the first time by way of reply, and when it is too late for the other side to be heard upon it. The general rule is, that the appellant must abide by the case made in his opening brief, and if he does not there show a sufficient ground for a reversal of the judgment, he can have no ground for complaint if it is affirmed. *People ex rel. v. Hanson et al.* 122.

7. *Immaterial questions.* This court will not consider the propriety of a question to a witness, when the answer thereto is in no manner prejudicial to the party objecting to the same. *Jacobson v. Gunzburg*, 135.

8. *Failure to ask instructions.* See PRACTICE, 6.

## RELEASE OF ERRORS.

9. *Plea of release of error—reversal on demurrer.* Where a demurrer is filed to a plea of release of errors, if the plea is held bad the judgment below must be reversed, without reference to the question whether the errors were well assigned. *Martin et al. v. Comrs. of Highways et al.* 158.

10. One of the objections in the circuit court to the record of the proceedings laying out a highway was, that it did not contain a written release of damages by P., one of the land owners over whose land the road was established. To the writ of error the defendants in error pleaded that on, etc., P., by his deed of that date, released to them "any and all errors in the record and proceedings aforesaid, so far as the same relate to him:" *Held*, that the plea was clearly bad on demurrer, and that P., not being a party to the writ of error, could not release errors assigned by the plaintiffs in error. *Ibid.* 158.

## MOTION TO DISMISS APPEAL.

11. *Overruled by judgment of reversal.* The reversal of a judgment by this court is, in effect, an overruling of a motion to dismiss the appeal. *Lester v. People*, 408.

**PRACTICE IN THE SUPREME COURT. Continued.****ASSIGNMENT OF ERROR.**

12. *On a ruling conceded, on trial, to be correct.* A party can not successfully assign for error the giving of an instruction laying down a rule substantially identical with the one laid down, or distinctly affirmed or recognized, in an instruction given at his own request. *City of Beardstown v. Smith*, 169.

**ERROR WILL NOT ALWAYS REVERSE.**

13. *Errors not urged in the Appellate Court.* This court is not disposed to hold that any error was committed by the Appellate Court in overruling or ignoring assignments of error which were not insisted upon or called to its attention. *Consolidated Coal Co. v. Bruce*, 449.

14. Where a party fails to make the refusal of instructions a ground for a new trial, and in his abstract in the Appellate Court fails to give the instructions asked and refused, and states in his brief filed in that court that he makes no point on the refusal of instructions, he will thereby waive his right, on appeal to this court, to assign for error the refusal of his instructions. *North Chicago Street Railroad Co. v. Wrixon*, 532.

15. A party can not take the judgment of the Appellate Court upon a question of fact, merely, and waive questions of law arising upon instructions, and when defeated on the fact, insist in the Supreme Court upon an error of law which was withdrawn from the consideration of the Appellate Court. *Ibid.* 532.

16. *Refusal of instruction—finding against the facts supposed.* On the trial of an action against a railway company for a personal injury, the court refused to instruct the jury "that, although they may believe, from the evidence, that defendant's servants were, in fact, guilty of some or all the acts of negligence charged in the declaration, yet if they further believe, from the evidence, that plaintiff, at the time he was injured, was lying upon defendant's track outside the limits of a street, he can not recover," etc. The jury specially found that the plaintiff, when injured, was not lying upon the track of defendant's road, and also that the place where he was injured was not outside of the limits of the street: *Held*, that in view of such finding the refusal of the instruction could not have injured the defendant. *East St. Louis Connecting Railway Co. v. O'Hara*, 580.

17. *Referring to the ad damnum.* Although the reference in an instruction to the amount in the *ad damnum* in the declaration is not to be commended, it will not constitute such error as to call for a reversal of the judgment, especially when the damages found are not unreasonable or exorbitant, and are made less than those sued for. *Ibid.* 580.

## PRESUMPTION.

## OF PAYMENT.

*Promissory note in hands of maker.* See PROMISSORY NOTES, 1.

## PROMISSORY NOTES.

## IN HANDS OF MAKER.

1. *Presumption of payment.* It is the general rule, that when a promissory note, due bill or other instrument for the payment of money is found in the possession of the maker, the presumption of payment arises. But this presumption does not arise when the debtor has had the means of obtaining possession or of canceling the obligation other than by paying it. In such case there is simply no presumption that the note is or is not paid, leaving the party having the affirmative upon that issue to establish the fact of payment. *Grimes v. Hilliary*, 141.

## PUBLIC SQUARE.

## DEDICATION.

*Title—rights of lot owner.* See DEDICATION, 3.

## PURCHASER AND VENDOR.

## OPTION TO PURCHASE.

*Rights of parties.* See CONTRACTS, 4 to 8.

## RAILROADS.

## RIGHT OF WAY.

1. *To be kept clear of dry grass, etc.* So much of a public street as is used and occupied by a railway company constitutes a part of its right of way, within the meaning of the statute requiring such companies to keep the right of way free from dead grass, dry weeds and other dangerous, combustible material. *Lake Erie and Western Railroad Co. v. Middlecoff et al.* 27.

2. The right of way of a railway company over and upon the streets in a city includes all that part of the street held and in actual use by such railway company for its main track, side-track, switches and turn-outs that are in anywise connected with its main track, and used by the railway company for loading and unloading cars or for storing cars. The company is required to keep such right of way clear from dead grass, etc. *Ibid.* 27.

3. *Possession, as notice of rights.* See EJECTMENT, 6.

## NEGLIGENCE.

4. *Evidence showing defendant's right to a side-track in street.* If a railway company obtains the right to lay a side-track upon a street by condemnation or by grant from the owner, on the question of the liability of the railway company for the escape of fire

**RAILROADS. NEGLIGENCE. Continued.**

from its engine it will be competent for the plaintiff to prove, as a collateral fact, the nature and extent of the defendant's right, or the burdens imposed upon its exercise, without pleading the condemnation or the private grant. And so the plaintiff may introduce the ordinance showing the rights and liabilities of the company. *Lake Erie and Western Railroad Co. v. Middlecoff et al.* 27.

**UNJUST DISCRIMINATION.**

5. *What constitutes—a question of fact.* Where a railway company charges a plaintiff a greater rate for freight than it does another party for the same distance of transportation of similar freight, the question whether this is an unjust discrimination is one of fact. The fact whether the freight of the plaintiff is of the same class as that of the other person is material in determining whether the discrimination is unjust. The difference in the charge, at most, only makes out a *prima facie* case of unjust discrimination. *Savits v. Ohio and Mississippi Railroad Co.* 208.

**SPEED OF TRAINS.**

6. *Right to regulate.* In the absence of any ordinance of a village regulating the speed of trains through its corporate limits, a railway company will have the right to run its trains through such village at any speed it may think proper, consistent with the safety of its trains and passengers, and of persons rightfully upon its right of way at road crossings, who are exercising ordinary care in crossing the railroad. Any person without ordinary care crossing a railroad, and receiving an injury by reason of the want of such care, can not recover therefor. *Partlow v. Illinois Central Railroad Co.* 321.

7. Under the rules of the common law, a railroad company is required to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on the highways crossing its railroad tracks; and in establishing the rate of speed that trains may be run, due regard must be had not only to the safety of passengers, but also to the safety of all persons, in the exercise of ordinary care, traveling on the highways over and across the railroad tracks. *Ibid.* 321.

8. So long as the increased speed of trains adds nothing to the damage and risks of passengers and the traveling public on highways, no one can reasonably complain; and, subject to this limitation, railroad companies may fix such rate of speed for the running of passenger trains as they may think best. *Ibid.* 321.

9. *Directions of the president of a village.* On the trial of an action against a railroad company, brought to recover for a personal injury resulting from negligence, the president of the village wherein the accident occurred was called as a witness by the plain-

**RAILROADS. SPEED OF TRAINS. *Continued.***

tiff, and asked if he had ever directed the marshal to notify the railroad company about fast running in the town, which the court refused to admit: *Held*, that the evidence was properly excluded. *Partlow v. Illinois Central Railroad Co.* 321.

10. *As evidence of negligence.* A person was killed at a highway crossing over a railroad in a town, and in an action against the railway company to recover damages for the killing, the court, at the request of the defendant, instructed the jury "that in the absence of any proof of a village ordinance, such a rate of speed as is customary among railroad companies with their fast trains is not, of itself, negligence on the part of the railroad company:" *Held*, that the instruction did not lay down a correct rule, but under the circumstances of this case the error was harmless. *Ibid.* 321.

11. Whether the speed of a train is negligence or not does not depend upon any custom or usage that may be established by railroad companies, nor upon the speed that may or may not be customary among such companies. In the absence of a statute or ordinance a railway company has the right to establish the speed of its trains. *Ibid.* 321.

**NEGLECT OF EMPLOYEES.**

12. *In transporting an engine of another company.* Where one railway company undertook to transport a locomotive of the plaintiff railway company to a certain point over its road, and the locomotive was placed on the defendant's road in charge of its conductor, and a fireman and engine-driver of the plaintiff operated the engine under the control of such conductor, their duties being merely mechanical, and they having no authority to say when the engine should start or at what station it should be side-tracked to allow trains of the defendant to pass, it was *held*, that if the engine was injured and destroyed while being transported, through the negligence of the defendant's conductor, the defendant was liable to the plaintiff for the loss. *Terre Haute and Indianapolis Railroad Co. v. Chicago, Peoria and St. Louis Railway Co.* 502.

**"TERMINAL FACILITIES."**

13. *Term construed.* See **CONTRACTS**, 9, 10.

**STREET RAILWAYS.**

14. *Liability to special assessment for local improvements.* See **SPECIAL ASSESSMENTS—SPECIAL TAXATION**, 12, 13.

**REASONABLE DOUBT.** See **CRIMINAL LAW**, 20, 21, 22.



**RECEIVER.****OF MORTGAGED PROPERTY.**

*Purpose of appointment—discharge.* See **MORTGAGES AND DEEDS OF TRUST**, 7, 8.

**REDEMPTION.****FROM JUDGMENT SALE.**

1. *Payment of taxes and assessments.* Where the purchaser of land at a sale under a judgment or decree shall pay taxes or assessments which become a lien during the time allowed for redemption, and the premises are redeemed, such taxes or assessments so paid, with interest, are, under the statute of 1889, to be included in and paid as part of the money required to make the redemption. This is for the reason that the payment inures to the benefit of the mortgagor and to the preservation of his estate. The reason does not apply where there is no redemption. *Davis v. Dale*, 239.

**REMITTITUR.****IN APPELLATE COURT.**

*Judgment for the remainder.* See **APPEALS AND WRITS OF ERROR**, 18.

**RENTS AND PROFITS.****AFTER FORECLOSURE SALE.**

1. *Rights of mortgagor.* See **MORTGAGES AND DEEDS OF TRUST**, 6.

**ROYALTY.**

2. *As rent of a coal mine—right of recovery.* See **CONTRACTS**, 16; **DOWER**, 7, 8, 9.

**RES JUDICATA.****MATTERS LITIGATED.**

1. *Proving by parol evidence.* See **FORMER ADJUDICATION**, 3.

**PLEA OF LIBERUM TENEMENTUM.**

2. *In an action of trespass quare clausum fregit.* See **TRESPASS QUARE CLAUSUM FREGIT**, 1 to 4.

**ROYALTY.****ON COAL MINED.**

1. *Its recovery as rent.* See **CONTRACTS**, 16.

2. *Dower rights.* See **DOWER**, 7, 8, 9.

**RULE IN SHELLY'S CASE.****A RULE OF PROPERTY.**

*The word "heirs" a word of limitation.* See **WILLS**, 3, 4, 5.

**SALES.****RESCINDING FOR FRAUD.**

*Damages recoverable—setting aside a deed.* See FRAUD, 3, 4, 5.

**SETTLEMENTS.****OFFERS OF SETTLEMENT.**

*Effect as evidence.* See EVIDENCE, 12, 13.

**SEWAGE.****POLLUTING A STREAM.**

*Preventing by injunction.* See NUISANCE, 5, 6.

**SEWERS.**

**SEWER PIPES IN A STREET.** See HIGHWAYS, 12, 13.

**"SHELLY'S CASE."****RULE APPLIED.**

*The word "heirs" in a will, a word of limitation.* See WILLS, 3, 4, 5.

**SPECIAL ASSESSMENTS—SPECIAL TAXATION.****FOR LOCAL IMPROVEMENTS.**

1. *How distinguished—powers.* Municipal authorities may require the special benefits accruing from a local public improvement to be assessed upon the property thus specially benefited, or may impose the same by way of special taxation, the two modes differing only in the manner of ascertaining the benefits. *Lightner v. City of Peoria*, 80.

2. *When authorized.* Special assessments and special taxes imposed for local improvements, unlike general taxes, are based upon benefits to the property against which they are assessed and levied, arising from its increased value in consequence of the improvement. They are authorized only when the local improvement, either actually or presumptively, benefits the particular property in an amount equal to the burden imposed. The liability for such tax is confined to the property benefited. *Ibid.* 80.

3. *Uniformity—taxing district.* The effect of an ordinance providing for a local improvement by special taxation is to create a taxing district composed of the property contiguous to the improvement. It lies at the foundation of the right to impose the taxes that they should be levied for a public purpose, and laid according to some fixed rule of apportionment, so that practical uniformity may be arrived at in their imposition upon persons or property within the taxing district, whether that district be the State, county, etc., or a district thereof created by ordinance for local improvement. *Ibid.* 80.

**SPECIAL ASSESSMENTS—SPECIAL TAXATION.****FOR LOCAL IMPROVEMENTS. *Continued.***

4. *Unequal benefits—dividing the improvement.* Where an improvement of an entire street benefits the contiguous property, upon different parts of it, in unequal proportions, the city council, in the exercise of their discretion, may divide the improvement, so as to secure practical uniformity in the distribution of the burden. The tax should be so levied, and such system of apportionment adopted, that the property subject to the tax will bear its just proportion of the burden in proportion to the benefits arising from the improvement. *Lightner v. City of Peoria*, 80.

5. And where a difference exists, not only in the nature, extent and cost of the improvement, but also in the benefits accruing to contiguous property upon different parts of the same improvement, the tax should be so levied that the burden will be borne in proportion to the benefits secured. But a mere arbitrary breaking up of the improvement into sections, having a tendency to produce unequal distribution of the tax, can not be sustained. *Ibid.* 80.

6. *Equal benefits—how determined.* The imposition of a special tax is of itself a determination by the legislative authority of the city that the benefit to contiguous property will be as great as the burdens imposed. By the statute, cities and villages are expressly authorized to determine that the improvement shall be made and paid for by special taxation of contiguous property, and in the absence of an abuse of their discretion the courts can not interfere. *Ibid.* 80.

7. *Special taxation according to frontage.* After municipal authorities have determined upon the width, character and kind of improvement to be made, and that it shall be paid for by special taxation according to frontage, it is their duty to so levy it as that equality in the imposition of the burden, so far as practicable, should be attained. *Ibid.* 80.

8. *Collecting tax in installments.* An assessment of a special tax will not be rendered void because the ordinance provides for the tax to be collected in installments, as it is provided special assessments for local improvement may be paid by the act of the legislature in force July 1, 1891. It is competent for the city authorities to provide, by ordinance, for the payment of special taxes by installments. *Ibid.* 80.

9. *Taxing district—what it comprises.* A taxing district created by ordinance, for the purpose of making a local improvement by special taxation, comprises all the property contiguous to the improvement subject to special taxation for making the same. A public street or alley is not contiguous property, within the sense of the statute, and therefore is not subject to special taxation. *Ibid.* 80.

**SPECIAL ASSESSMENTS—SPECIAL TAXATION.****FOR LOCAL IMPROVEMENTS. Continued.**

10. *Taxation of streets.* The fee of the streets of a city being vested in the city for the use of the general public, they are not the subject of taxation, and no sale of the streets can be made to satisfy a special tax, if assessed on them. *Lightner v. City of Peoria*, 80.

11. *Paving a street—exclusion of street railway.* In a proceeding by a city to improve and pave a street by special taxation, the exclusion of the rights of way held by street railway companies from the pavement, etc., will not invalidate the ordinance. *Ibid.* 80.

12. *Taxation of street railway—according to frontage.* It can not be said that a railway right of way has a frontage upon the street, as that term is applied to abutting property, and while it is to be treated as contiguous property, and be required to contribute to the burden of local improvements, some apportionment of the tax must be adopted other than by frontage. *Ibid.* 80.

13. *Discretion of municipal authorities.* Whether a street railway company shall pay for paving between its tracks, as is sometimes done, or more or less, or whether the levy shall be of a share or portion of the whole cost, and if so, how much, rests in the discretion of the municipal authorities, to be reasonably exercised. In the absence of anything showing to the contrary, it must be presumed that the municipal authorities have exercised their discretion reasonably, and required of the railway companies payment of their just and equal proportion of the cost of the local improvement. *Ibid.* 80.

14. *General discretion of municipal authorities.* In the passage of an ordinance providing for a local improvement, the city council is clothed with power to determine what improvement is required, its nature and character, when it shall be made, and the manner of its construction. These are matters resting in the discretion of the city council, and that discretion, when honestly and reasonably exercised, can not be reviewed by the courts. *English v. City of Danville*, 92.

15. *Amendments—article 9.* The section of the act of April 29, 1887, relating to cities and villages, were passed to amend article 9 of the general Incorporation act, and became a part of it. By the act of June 15, 1891, sections 55 and 63 of the act of 1887 were amended, and the act of 1893 is to be regarded as an amendment to the act of 1887, as amended by the act of 1891, as it relates to the same subject matter, and, in effect, changes the sections of the act of 1887, relating to the collection of special assessments. *Ibid.* 92.

16. The mere fact that the act of 1893 does not, in its title, profess to amend article 9 of the Cities and Villages act, is unimportant.

**SPECIAL ASSESSMENTS—SPECIAL TAXATION.****FOR LOCAL IMPROVEMENTS. Continued.**

If the later act made a change in the mode of procedure, it may be regarded as an amendment to the other act, and the act of 1893 includes special taxes as well as special assessments, which may be made payable in installments. *English v. City of Danville*, 92.

17. *Assessment for improvement already made.* A city can not, by accepting and adopting an improvement of a street, compel property owners to pay for it by special assessment or special taxation. The statute does not contemplate that the city council shall go on and make the improvement, and after it is completed levy and collect a special assessment or tax to pay for the same. *City of East St. Louis v. Albrecht*, 506.

18. The first step to be taken in making a local improvement to be paid for by special assessment, is the passage of an ordinance specifying the nature of the proposed improvement, and the mode in which the cost thereof shall be collected; and until such ordinance is passed, as required by the statute, no work can be done or expense incurred which can become a charge on the property of the land owner. *Ibid.* 506.

19. *Assessment annulled—defective ordinance—new assessment.* Where the improvement has been ordered by ordinance, and the assessment has been annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made as provided in section 46 of article 9 of the City and Village act. In such a case the existence of an ordinance when the work was done is the basis of the re-assessment; and even when the original ordinance proves defective, and insufficient to support an assessment, yet if not absolutely void it may be amended, or the defect cured by a supplemental ordinance, and a re-assessment made. *Ibid.* 506.

**SPECIAL TAXATION.**

20. *Basis—abutting property—cross streets.* It is no valid objection to a special tax to pay for grading or paving a street, that the city or village is not required to pay the cost of improving the street intersections. Streets crossing the one sought to be improved are not abutting lots. *Holt et al. v. City of East St. Louis*, 530.

21. The object of special taxation is not to have each lot pay for the actual cost of what is done in front of it, but to have it pay its proportionate share of the whole cost of the improvement. *Ibid.* 530.

**ORDINANCE THEREFOR.**

22. *Sufficiency of description of proposed improvement.* A substantial compliance with the statute, which requires the ordinance for a local improvement to specify "the nature, character, locality and description of the improvement," will be sufficient. *Vane et al. v. City of Evanston*, 616.

## SPECIAL ASSESSMENTS—SPECIAL TAXATION.

ORDINANCE THEREFOR. *Continued.*

23. An objection to an ordinance for the paving of a street, that it fails to provide for man-holes and catch-basins to convey from the pavement the surface water, dirt, etc., where a sewer has already been constructed in the street sufficient for the purpose, will not avail to defeat the assessment. *Vane et al. v. City of Evanston*, 616.

24. *Discretion as to extent of local improvement.* The municipal authorities of cities and villages are made, by the statute, the judges of the utility of an improvement upon streets, and whether such improvement shall be treated as a local improvement in raising funds to pay for it, and their decision on these questions is final. Where the ordinance provides for an improvement complete in itself, it will not follow that the ordinance is to be deemed void because the utility of the improvement might be enhanced by the addition of something more which has been omitted. *Ibid.* 616.

## CONFIRMATION PROCEEDINGS.

25. *Personal view by jury.* In a proceeding to confirm a special assessment by a city or village for a local improvement, the court has the power, in the exercise of a reasonable discretion, to permit, in proper cases, a view of the property assessed, or the *locus in quo*, by the jury, on the issue of benefits to the property specially assessed. *Ibid.* 616.

26. *Matters to be considered.* See EMINENT DOMAIN, 27.

## DAMAGES AND BENEFITS.

27. *Set off—res judicata.* See FORMER ADJUDICATION, 1, 2, 3; EMINENT DOMAIN, 23 to 26.

## STATUTES.

## AMENDMENTS.

1. *Article 9 of Cities and Villages act.* See SPECIAL ASSESSMENTS—SPECIAL TAXATION, 15, 16.

## STATUTES CONSTRUED.

2. *Section 9, chapter 51, of the Revised Statutes—production of books and papers for inspection.* See EVIDENCE, 15 to 18.

3. *Library act—effect on trustees of the Newberry library.* See NEWBERRY LIBRARY, 3.

4. *Statute of Wills—subscribing witnesses.* See WILLS, 11 to 14.

5. *Action for injury caused by sale of intoxicating liquors—parties.* See INTOXICATING LIQUORS, 1, 2, 3.

## STATUTE OF FRAUDS.

## BOUNDARY LINE.

*Establishing by parol agreement.* See BOUNDARIES, 1 to 4.

**STIPULATION.****AS TO FACTS.**

*Effect in avoiding variance.* See PLEADING AND EVIDENCE, 2.

**STREETS.****LEGISLATIVE POWER.**

1. *Power of legislature to change the control.* The power of the legislature over the public streets, when private rights will not be violated, to change the possession and control of the same, can not be questioned. *McCormick v. South Park Comrs.* 516.

**PUBLIC AND PRIVATE USE.**

2. *Private use of part of street.* The owners of lots bordering upon streets or ways have the right to make all proper and reasonable use of such part of the street for the convenience of their lots, not inconsistent with the paramount right of the public to the use of the street in all its parts. *Ibid.* 516.

3. In the absence of legislative direction or municipal declaration of what such right shall be, what is to be deemed a reasonable and proper use will depend, in a large degree, upon the public usage in like instances and upon the local situation. General use by the lot owners, and acquiescence therein by the public and public authorities, may always be resorted to as evidence of what is a reasonable and proper use, and of the existence of the right. *Ibid.* 516.

**SPECIAL TAXATION.**

4. *For local improvements.* See SPECIAL ASSESSMENTS—SPECIAL TAXATION, 9, 10.

**INTERSECTIONS.**

5. *Streets as abutting property.* Same title, 20.

**SIDEWALKS—CROSSINGS.**

6. *Duty of city to keep in repair.* See MUNICIPAL CORPORATIONS, 1 to 4.

**OBSTRUCTIONS.**

7. *Water, sewer and gas pipes, and water works, in a street.* See HIGHWAYS, 12, 13, 14.

**RIGHT OF RAILROAD COMPANY.**

8. *Setting fires—liability.* See RAILROADS, 1 to 4.

9. *Keeping free from grass, weeds, etc.* Same title, 1, 2.

**STREET RAILWAY.****TAXATION.**

*For paving a street.* See SPECIAL ASSESSMENTS—SPECIAL TAXATION, 12, 13.

## TAXATION AND TAX TITLES.

## ASSESSMENT.

1. *Reviewing, reducing or increasing the assessment.* Under section 86 of the Revenue law, as amended in 1891, the power of the county board to review and reduce assessments on complaint of individual property owners, so far as it applies to assessments made prior to the fourth Monday of June, is purely appellate, and can arise only when an appeal has been taken in the manner prescribed by the amendatory act. Any attempt by the county board to reduce an assessment made prior to the fourth Monday of June, except on appeal from the town board of review, is without legal authority, and inoperative and void. *Workingmen's Banking Co. v. Wolff*, 491.

2. Where the county board attempts to reduce assessments on complaints presented to it in the first instance, and not on appeal from the township board of review, its action will be ineffectual, and such attempted reduction will not authorize an addition to the assessment of the personal property of a town to make up the alleged deficiency caused by such attempted reduction. *Ibid.* 491.

3. While a county board may equalize assessments, it has no power to raise or reduce the assessment above or below the amount returned by the assessors, and if the aggregate assessment is raised above that amount, the collection of the increased taxes on such assessment may be enjoined in a court of equity. *Ibid.* 491.

4. If a county board acts illegally in changing assessments, its action will not vitiate or change the legal acts of the assessors of the towns, and until legally changed or vacated, the assessments are binding on the tax-payers. *Ibid.* 491.

5. *County board—jurisdiction prior to 1891.* As the Revenue law stood prior to the amendment of June 17, 1891, county boards, in counties under township organization, had no appellate jurisdiction over the action of township boards of review, and no original jurisdiction to hear complaints of persons aggrieved by the assessment of their property, except in case of property assessed after the first Monday of June. *Ibid.* 491.

6. *Money in bank—deducting amount of debts.* A party having money in bank on the first day of May, is required, by item 26 of section 25 of the Revenue act, to list the same for taxation, and he can not refuse to do so on the ground that he owes debts to an amount equal to such money. As to credits other than of bank, banker, broker or stock jobber he is allowed to deduct therefrom the amount of his *bona fide* indebtedness. *Morris et al. v. Jones*, 542.

7. There is nothing in the statute allowing deductions of indebtedness against tangible property owned by a tax-payer, no matter what may be the character of such property. Money, like



TAXATION AND TAX TITLES. ASSESSMENT. *Continued.*

horses, cattle or other chattel property, is made taxable under our statute, without reference to the indebtedness of the owner. But as to credits, viz., moneys due, *bona fide* debts owing may be deducted. *Morris et al. v. Jones*, 542.

8. *Deductions from credits.* If a tax-payer deducts his indebtedness from his credits, it must be done in the manner provided by section 29 of the Revenue act. It is not for him to say the indebtedness equals or exceeds the credits, and therefore refuse to list the credits. *Ibid.* 542.

9. *Duty of assessor to assess property not listed.* If a tax-payer omits from his schedule of personal property, money in bank, it is not only the right, but the duty, of the assessor, on learning that fact, to place it on the schedule, and he is not required to give the tax-payer any notice whatever of his action in that regard. *Ibid.* 542.

## THREATS.

## OF THIRD PERSONS.

*Inadmissible as evidence.* See CRIMINAL LAW, 18, 19.

## TORT.

## JOINT LIABILITY.

*Action against either.* See NEGLIGENCE, 1.

## TRESPASS QUARE CLAUSUM FREGIT.

## PLEA OF LIBERUM TENEMENTUM.

1. *Judgment conclusive of title.* It has been held that if, in an action of trespass *quare clausum fregit*, the defense pleaded is *liberum tenementum*, judgment for the plaintiff is conclusive upon the defendant when he afterward attempts to set up title, subject to the qualification that the close described in the second action is the same as that described in the first. *Elson et al. v. Comstock*, 303.

2. Other decisions hold, that while the judgment in such case will not be regarded as conclusive, yet it may be shown by parol evidence, or otherwise, that the question of title was actually tried and passed upon in the action of trespass. Such a judgment is necessarily conclusive as to what appears from the record or is shown by parol to have been involved in the issues made by the pleadings in the suit, and to have actually come in question on the trial. *Ibid.* 303.

3. In an action of trespass *quare clausum fregit*, brought in respect to a block of land in a village, the defendant pleaded title in the village, and that the block had been previously dedicated to the public for a public square; that such dedication had been accepted

## TRESPASS QUARE CLAUSUM FREGIT.

PLEA OF LIBERUM TENEMENTUM. *Continued.*

by the public, and that the village was simply possessing itself of the block for its own benefit: *Held*, that a judgment for the defendant upon such issues must be regarded as *res judicata* so far as the right of the village to possess and use the block as and for a public square was concerned, and also conclusive upon lot owners in the village to the rights they might otherwise have to such use of the block, because their rights were dependent upon those of the village. *Elson et al. v. Comstock*, 303.

4. *Gist of the action.* While the action of trespass *quare clausum fregit* does not necessarily involve the title or seizin, yet the gist of the action is the injury to the possession. Hence, the judgment in such action will ordinarily be conclusive upon the right of possession. *Ibid.* 303.

## TRUSTS AND TRUSTEES.

## RESULTING TRUST.

1. *When it arises.* As a general rule, where real property is purchased and paid for by one person and the legal title is taken in the name of another person, the parties being strangers to each other,—that is, not a wife or child, or person standing in that relation,—a resulting trust immediately arises from the transaction, and the person to whom the land is conveyed will hold it in trust for the one who paid the purchase money. *McDonald v. Carr et al.* 204.

2. A purchased a tract of land in her own name, and paid the purchase money from her own funds. The contract for a deed provided that the vendor should convey to her, but when the last payment was made, at the request of A the deed was made to B. A and B had before that time married, but B then had a wife living from whom he had no divorce: *Held*, that A and B were strangers to each other, their marriage being void, and a resulting trust arose in favor of A, and that B took the legal title in trust for A. *Ibid.* 204.

## NEWBERRY LIBRARY.

3. *Powers of trustees—will construed.* See NEWBERRY LIBRARY, 1, 2, 3.

## UNJUST DISCRIMINATION.

## IN RAILROAD RATES.

*What constitutes—question of fact.* See RAILROADS, 5.

## USE AND OCCUPATION.

RECOVERY UNDER THE COMMON COUNTS. See LANDLORD AND TENANT, 10.

**VARIANCE.****PLEADING AND PROOFS.**

*Obviated by stipulation.* See PLEADING AND EVIDENCE, 2.

**VENDOR AND PURCHASER.****VENDOR'S LIEN.**

1. *Extent of the lien—waiver.* See LIENS, 4, 5, 6.

**CONSIDERATION.**

2. *Assuming the indebtedness—discounting claims.* See CONTRACTS, 1, 2, 3.

**VENUE.****IN A CRIMINAL CASE.**

*Proof of venue essential.* See CRIMINAL LAW, 23, 24, 25.

**VERDICT.****SPECIAL FINDING OF FACTS.**

*Presumptions in support of general verdict.* See PRACTICE, 8, 9.

**WAIVER.****OF OBJECTION.**

1. *To the admissibility of evidence.* See EVIDENCE, 10.

2. *By failure to object in time.* See PRACTICE, 11, 12.

3. *Original bill of exceptions as a part of the transcript of the record.* See APPEALS AND WRITS OF ERROR, 20, 21.

**JURISDICTION.**

4. *Waiver of right to question.* See CHANCERY, 3.

**DEFECTS IN PLEADING.**

5. *Waived by pleading to the merits.* See PLEADING, 2.

**WANTON AND WILLFUL MISCONDUCT.**

*ILL-WILL IS NOT MATERIAL.* See NEGLIGENCE, 24.

**WATER-WAYS.****POLLUTION OF A STREAM.**

*By discharging sewage therein.* See NUISANCE, 1 to 4.

**WATER WORKS.****WATER PIPES AND STAND-PIPE.**

*Use of a street therefor.* See HIGHWAYS, 12, 13, 14.

## WILLS.

## REFERENCE TO OTHER INSTRUMENTS.

1. *Recital of a gift not made.* Where the testator, in his will, recites that he has, by some instrument other than the will, given property to a person named, when, in truth and in fact, he has not done so, such erroneous recital will not disclose a purpose and intent to give by the will. In such case resort must be had to the other instrument, and not to the will. *Benson et al. v. Hall et al.* 60.

## DEVISE CONSTRUED.

2. *"Heirs" a word of limitation.* A testator provided by his will as follows: "After the death of my wife, as aforesaid, I give and bequeath unto my beloved daughter, N., during her natural life, and after her death to descend and vest in her legal heirs, thirty-five acres," describing the land: *Held*, that the daughter took the title to the land in fee. *Vangieson et al. v. Henderson et al.* 119.

3. *The rule in Shelly's case.* The rule is, whenever the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the word "heirs" is one of limitation of the estate, and not of purchase, and the ancestor takes the fee. *Ibid.* 119.

4. The word "heirs" being used in the generally accepted legal sense, is, under the rule, one of limitation, and no intention of the testator, however clearly expressed, can change it into a word of purchase. The rule in *Shelly's case* is in force here as a rule of property, and the question of intent, in determining whether it is applicable in a given case, does not turn upon the quantity of estate intended to be given to the ancestor. *Ibid.* 119.

5. *Whether giving an estate, or mere management.* A testator, by his will, provided as follows: "I leave all my property in the hands of my wife, C., to manage for the best interest of our children and herself. \* \* \* She is to pay all my debts from the proceeds of the farm, but I give her power to sell my house and lot in W., and land in the State of Iowa, if necessary to pay debts," etc. The will also provided that the testator's farm of three hundred and fourteen acres should not be sold while his wife lived, and gave her the right to sell the coal underlying the farm, etc.: *Held*, that C., the widow, did not take an estate in fee in the farm, and that the same, upon the testator's death, passed to his three children, subject to its management by the widow during her lifetime. In such case the word "leave" did not mean "devise." *Allen et al. v. McFarland et al.* 455.

6. *Whether creating a contingent remainder.* By the fourth clause of the will it was provided that the farm should not be sold while the testator's widow lived, but that on her death it might be di-

**WILLS. DEVISE CONSTRUED. Continued.**

vided among his children, or such of them as might be living at that time, to "have and to hold unto them, their heirs and assigns, forever:" Held, that the children did not take a contingent remainder, but a vested estate. *Allen et al. v. McFarland et al.* 455.

7. The rule is familiar that contingent remainders are not favored, and the estate will always be regarded as vested unless a contrary intention is clearly manifested. It is an indispensable requisite to a contingent remainder that there shall be a present vested freehold estate to support it. *Ibid.* 455.

8. *Executory devise.* A disposition of land by a testator will not constitute an executory devise where the devisee's right in the estate is vested and immediate, and is not postponed to take effect *in futuro*, or dependent upon any contingency. *Ibid.* 455.

**RULES OF CONSTRUCTION.**

9. *Intention of testator.* In construing a will all of its provisions are to be considered, and the true intention of the testator, if possible, thus ascertained. The intention of the testator expressed in, or fairly drawn from, his will, must control in its construction. *Ibid.* 455.

10. *No particular form required for a valid will.* The law does not require, as a prerequisite to the validity of a will, that it shall be in accord with any particular form, or couched in language technically appropriate to the testamentary character of the instrument. However irregular in form or inartificial in expression, it will suffice, if, from a consideration of the whole instrument, may be gathered an intention on the part of the maker that a posthumous disposition of his property was by him intended. *Ibid.* 455.

**SUBSCRIBING WITNESSES.**

11. *Competency of husband or wife of devisee.* The husband or wife of one to whom a devise or legacy is given by a will is not a competent witness to prove the execution of the will, and is not rendered competent by the release by the devisee of all his rights under the will. Such attesting witnesses are not competent as to devises and bequests made to persons other than to the wife or husband of either of said witnesses. *Fisher et al. v. Spence et al.* 253.

12. *Statute construed.* Section 8 of the Statute of Wills, which declares that "if any beneficial devise, legacy or interest shall be made or given in any will, testament or codicil, to any person subscribing such will, testament or codicil as a witness of the execution thereof, such devise shall, \* \* \* as to such subscribing witness, and all persons claiming under him, be null and void," has no application to the interests of any persons other than those who are attesting witnesses, and does not declare such interests null

**WILLS. SUBSCRIBING WITNESSES. Continued.**

and void. Nor does the statute assume to render competent any subscribing witnesses other than those to whom a beneficial devise, etc., was made or given. *Fisher et al. v. Spence et al.* 253.

13. The only devises declared void by this statute are beneficial devises to a subscribing witness. It does not avoid even a devise to a subscribing witness which gives him no beneficial interest, as, for instance, a devise to an executor for the exclusive benefit of other persons. Section 5 of the act relating to evidence does not render a husband a competent attesting witness to prove a will making a devise to his wife. *Ibid.* 253.

14. "*Credible witnesses*"—*statute construed.* The expression in section 2 of the Statute of Wills, "credible witnesses," means competent witnesses. The competency of attesting witnesses to a will is to be tested upon the state of facts existing at the time of such attestation, and not that existing at the time the will is presented for probate. *Ibid.* 253.

**WITNESSES.**

**IMPEACHMENT.**

1. *Impeaching party's own witness.* While a party, after putting a witness upon the stand, is not at liberty to introduce evidence tending directly to impeach him, he may show that his evidence given for the other party is in fact untrue, although his so doing may constitute an indirect impeachment. *East St. Louis Connecting Railway Co. v. O'Hara*, 580.

**IN A CRIMINAL CASE.**

2. *Not named on an indictment.* See CRIMINAL LAW, 6.
3. *Qualification—former conviction of perjury.* Same title, 5.

**WORDS AND PHRASES.**

**THE WORD "CARS."**

1. *Includes locomotive engines.* See NEGLIGENCE, 27.

**THE WORD "HEIRS."**

2. *Construed—rule in Shelly's case.* See WILLS, 2, 3, 4.

**"TERMINAL FACILITIES."**

3. *Construed.* See CONTRACTS, 9, 10.

# TABLE OF CASES

COMPRISING THE FORMER DECISIONS OF THIS COURT, CITED, COMMENTED  
UPON OR EXPLAINED IN THIS VOLUME.

<b>A</b>	<b>PAGE.</b>
Abend <i>ads.</i> Missouri Furnace Co. 107 Ill. 44.....	105
Abrahams v. Weiller, 87 Ill. 179.....	137
Ackerson v. The People, 124 Ill. 568.....	187
Albin v. Kinney, 96 Ill. 214.....	536
Aldrich <i>ads.</i> Chicago, Peoria and St. Louis Ry. Co. 134 Ill. 9.....	379
Aldrich <i>ads.</i> Wulff, 124 Ill. 592.....	198
Allen <i>ads.</i> McDonald, 128 Ill. 521.....	361
Allen <i>ads.</i> State, 43 Ill. 456.....	500
Alphin v. Working, 132 Ill. 484.....	361
Alton, City of, v. Transportation Co. 12 Ill. 38.....	523
Alton and Sangamon R. R. Co. v. Carpenter, 14 Ill. 190.....	371
Anthony <i>ads.</i> The People, 129 Ill. 218.....	610
Arnold v. Johnson, 1 Scam. 196.....	226
Atkin v. Merrill, 39 Ill. 62.....	473
Attorney General v. Chicago and Evanston R. R. Co. 112 Ill. 520....	574
Aurora, City of, v. Dale, 90 Ill. 46.....	105
Aurora, City of, v. Hillman, 90 Ill. 61.....	105, 173

<b>B</b>	
Backes <i>ads.</i> Pennsylvania Co. 133 Ill. 255.....	361
Bair <i>ads.</i> Mason, 33 Ill. 194.....	217
Baker <i>ads.</i> May, 15 Ill. 89.....	164
Baker v. Scott, 62 Ill. 86.....	121, 199
Baker <i>ads.</i> Skinner, 79 Ill. 496.....	47
Barling <i>ads.</i> Field, 149 Ill. 556.....	530
Bartholomew v. The People, 104 Ill. 608.....	74
Bauer v. Gottmanhausen, 65 Ill. 499.....	578
Bauerlee <i>ads.</i> Redlich, 98 Ill. 137.....	216
Beal v. Harrington, 116 Ill. 113.....	225
Beardsley v. Smith, 139 Ill. 280.....	160
Beeler v. Webb, 113 Ill. 436.....	397
Belleville Savings Bank <i>ads.</i> Welsch, 94 Ill. 191.....	215
Bennehoff <i>ads.</i> Fisher, 121 Ill. 426.....	579
Bennett v. Matson, 41 Ill. 332.....	243
Bennett v. The People, 96 Ill. 602.....	445

	PAGE
Berkowitz <i>ads.</i> Lester, 125 Ill. 307.....	416
Bitter <i>v.</i> Saathoff, 98 Ill. 266.....	540
Blake <i>v.</i> Blake, 80 Ill. 523.....	426
Blake <i>ads.</i> Chicago and Evanston R. R. Co. 116 Ill. 163.....	377
Blanchard <i>v.</i> Lake Shore and Michigan South. Ry. Co. 126 Ill. 416.....	356
Bloomington, City of, <i>v.</i> Bloomington Cemetery Ass. 126 Ill. 221....	579
Bloomington, City of, <i>v.</i> Chicago & Alton R. R. Co. 134 Ill. 452.....	86
Bloomington, City of, <i>ads.</i> Harwood, 124 Ill. 48.....	378
Bloomington, City of, <i>v.</i> Latham, 142 Ill. 462.....	576
Bloomington, City of, <i>ads.</i> McLean County, 106 Ill. 209.....	87, 531
Bluhm <i>ads.</i> Pullman Palace Car Co. 109 Ill. 20.....	397
Board of Education <i>v.</i> Trustees, 63 Ill. 204.....	151
Board of Trustees <i>ads.</i> Wilson, 133 Ill. 443.....	271, 370
Bodman <i>v.</i> Drainage District, 132 Ill. 440.....	197
Bonifield <i>ads.</i> Chicago & Alton R. R. Co. 104 Ill. 223.....	105
Bonner <i>v.</i> Peterson, 44 Ill. 253.....	474
Booth <i>v.</i> Hynes, 54 Ill. 363.....	218
Booth <i>v.</i> Wiley, 102 Ill. 84.....	217
Bowman <i>ads.</i> Chicago, Burlington and North. R. R. Co. 122 Ill. 595.....	378
Boyd <i>v.</i> Strahan, 36 Ill. 358.....	461
Boynton <i>v.</i> Champlin, 42 Ill. 57.....	225
Bradley <i>ads.</i> Donlin, 119 Ill. 412.....	207
Brant <i>ads.</i> Northwestern Distilling Co. 69 Ill. 658.....	356
Bressler <i>v.</i> The People, 117 Ill. 422.....	189
Bross <i>ads.</i> City of Cairo, 99 Ill. 521.....	197
Bryan <i>v.</i> Wash, 2 Gilm. 557.....	47
Buck <i>v.</i> Buck, 60 Ill. 105.....	423
Buckmaster <i>ads.</i> Godfrey, 1 Scam. 450.....	349
Buckmaster <i>ads.</i> Mason, Beecher's Breese, 27.....	417
Buffum <i>ads.</i> Jones, 50 Ill. 278.....	114
Bull <i>ads.</i> City of Quincy, 106 Ill. 337.....	199, 593
Bulliner <i>v.</i> The People, 95 Ill. 394.....	76
Burgess <i>ads.</i> Capes, 135 Ill. 67.....	164
Burlington and Ohio River Ry. Co. <i>ads.</i> McReynolds, 106 Ill. 152.....	376
Burnside <i>ads.</i> Clark, 15 Ill. 62.....	475
Burnside <i>ads.</i> Kingsbury, 58 Ill. 310.....	49
Burton <i>ads.</i> Glennon, 144 Ill. 551.....	140
Butler & McCracken <i>v.</i> Gain, 128 Ill. 23.....	631
Byars <i>v.</i> Spencer, 101 Ill. 429.....	47

## C

Cairo, City of, <i>v.</i> Bross, 99 Ill. 521.....	197
Callison <i>ads.</i> Cutler, 72 Ill. 113.....	579
Calumet Iron and Steel Co. <i>v.</i> Martin, 115 Ill. 358.....	566
Canty <i>ads.</i> St. Louis Transfer Co. 103 Ill. 423.....	197
Capes <i>v.</i> Burgess, 135 Ill. 67.....	164



	PAGE.
<b>Carlyle, City of, v. Clinton County</b> , 140 Ill. 512.....	510
<b>Carpenter ads. Alton and Sangamon R. R. Co.</b> 14 Ill. 190.....	371
<b>Carpenter v. Van Olinder</b> , 127 Ill. 42.....	121
<b>Carr v. Waugh</b> , 28 Ill. 418.....	164
<b>Carter v. City of Chicago</b> , 57 Ill. 285.....	523
<b>Carter ads. Fleming</b> , 70 Ill. 288.....	115
<b>Case ads. Hurd</b> , 32 Ill. 45.....	403
<b>Casey v. Casey</b> , 14 Ill. 127.....	216
<b>Cauley ads. East St. Louis Electric Ry. Co.</b> 148 Ill. 490.....	11
<b>Cemetery Ass. v. Minnesota and Northw'n R. R. Co.</b> 121 Ill. 199, 378, 383	
<b>Chamberlin ads. Darlington</b> , 120 Ill. 585.....	361
<b>Champlin ads. Boynton</b> , 42 Ill. 57.....	225
<b>Champlin v. Champlin</b> , 136 Ill. 312.....	207
<b>Chaplin v. Comrs. of Highways</b> , 126 Ill. 264.....	198
<b>Cheney ads. Morris</b> , 51 Ill. 451.....	168
<b>Chicago Artesian Well Co. v. Connecticut Mut. Life Ins. Co.</b> 57 Ill. 242	403
<b>Chicago and Alton R. R. Co. ads. Bloomington</b> , 134 Ill. 256.....	86
<b>Chicago and Alton R. R. Co. v. Bonifield</b> , 104 Ill. 223.....	105
<b>Chicago and Alton R. R. Co. v. Fisher</b> , 141 Ill. 625.....	555
<b>Chicago and Alton R. R. Co. v. Joliet, L. and A. Ry. Co.</b> 105 Ill. 388.	597
<b>Chicago and Alton R. R. Co. ads. The People</b> , 55 Ill. 111.....	209
<b>Chicago and Alton R. R. Co. v. The People</b> , 67 Ill. 19.....	209
<b>Chicago and Alton R. R. Co. ads. Vincent</b> , 49 Ill. 35.....	209
<b>Chicago Building Society ads. Haas</b> , 89 Ill. 498.....	242
<b>Chicago, Burlington and Northern R. R. Co. v. Bowman</b> , 122 Ill. 595	378
<b>Chicago, Burlington and Quincy R. R. Co. v. Dickson</b> , 88 Ill. 431..	537
<b>Chicago, Burlington and Quincy R. R. Co. v. The People</b> , 77 Ill. 443	209
<b>Chicago, City of, ads. Carter</b> , 57 Ill. 285.....	523
<b>Chicago, City of, ads. Chicago and Northwestern Ry. Co.</b> 140 Ill. 309	597
<b>Chicago, City of, ads. Fagan</b> , 84 Ill. 231.....	96, 621
<b>Chicago, City of, ads. Gage</b> , 143 Ill. 157.....	620
<b>Chicago, City of, ads. Green</b> , 97 Ill. 371.....	379
<b>Chicago, City of, ads. Illinois Central R. R. Co.</b> 141 Ill. 586.....	597, 621
<b>Chicago, City of, v. Keefe</b> , 114 Ill. 222.....	533
<b>Chicago, City of, ads. Kreigh</b> , 86 Ill. 407.....	524
<b>Chicago, City of, ads. Lake S. and Mich. South. Ry. Co.</b> 148 Ill. 509..	597
<b>Chicago, City of, ads. Legare</b> , 139 Ill. 46.....	593
<b>Chicago, City of, v. Major</b> , 18 Ill. 349.....	385
<b>Chicago, City of, v. McGinn</b> , 21 Ill. 266.....	523
<b>Chicago, City of, v. O'Brennan</b> , 65 Ill. 160.....	178
<b>Chicago, City of, ads. Rigney</b> , 102 Ill. 64.....	382, 595
<b>Chicago, City of, ads. Scammon</b> , 42 Ill. 192.....	531
<b>Chicago, City of, ads. Snell</b> , 133 Ill. 413.....	597
<b>Chicago, City of, ads. Springer</b> , 135 Ill. 552.....	380, 621
<b>Chicago, City of, ads. Washington Ice Co.</b> 147 Ill. 327.....	381, 573
<b>Chicago City Ry. Co. v. Wilcox</b> , 138 Ill. 370.....	533

	PAGE.
Chicago and Eastern R. R. Co. v. Holland, 122 Ill. 461.....	397
Chicago and Eastern Illinois R. R. Co. v. O'Connor, 119 Ill. 586.....	105
Chicago and Evanston R. R. Co. <i>ads.</i> Attorney General, 112 Ill. 520.....	574
Chicago and Evanston R. R. Co. v. Blake, 116 Ill. 163.....	377
Chicago, Milwaukee and St. Paul Ry. Co. <i>ads.</i> Eberhardt, 70 Ill. 347.....	374
Chicago, Milwaukee and St. Paul Ry. Co. v. Hall, 90 Ill. 42.....	376
Chicago, Milwaukee and St. Paul Ry. Co. v. Halsey, 133 Ill. 248.....	555
Chicago, Milwaukee and St. Paul Ry. Co. <i>ads.</i> Page, 70 Ill. 324.....	373
Chicago, Milwaukee and St. Paul Ry. Co. v. Wilson, 133 Ill. 60.....	327
Chicago and North Wisconsin Ry. Co. <i>ads.</i> Dupuis, 115 Ill. 97.....	377
Chicago and Northwestern Ry. Co. v. City of Chicago, 140 Ill. 309.....	597
Chicago and Northwestern Ry. Co. v. Dunleavy, 129 Ill. 132.....	194, 326
Chicago and Northwestern Ry. Co. v. Jackson, 55 Ill. 492.....	397
Chicago and Northwestern Ry. Co. v. The People, 56 Ill. 365.....	209
Chicago and Northwestern Ry. Co. <i>ads.</i> Schmidt, 83 Ill. 405.....	105
Chicago and Pacific Ry. Co. v. Francis, 70 Ill. 238.....	373
Chicago and Pacific Ry. Co. v. Stein, 75 Ill. 41.....	375
Chicago, Peoria and St. Louis Ry. Co. v. Aldrich, 134 Ill. 9.....	379
Chicago, Peoria and St. Louis Ry. Co. v. Eaton, 136 Ill. 9.....	381
Chicago and Rock Island R. R. Co. v. Fell, 22 Ill. 333.....	139
Chicago and Rock Island R. R. Co. v. Whipple, 22 Ill. 105.....	139, 203
Chicago, Rock Island and Pacific R. R. Co. v. Lewis, 109 Ill. 120.....	356
Chicago, Rock Island and Pacific R. R. Co. v. Morris, 26 Ill. 400.....	557
Chicago, Santa Fe and California R. R. Co. <i>ads.</i> Kiernan, 123 Ill. 188.....	378
Christen <i>ads.</i> Weber, 121 Ill. 91.....	49
Clapp <i>ads.</i> Young, 147 Ill. 176.....	56
Clark v. Burnside, 15 Ill. 62.....	475
Clark <i>ads.</i> Steele, 77 Ill. 471.....	215
Clinton, County of, <i>ads.</i> City of Carlyle, 140 Ill. 512.....	510
Cobb v. Lavalle, 89 Ill. 331.....	115
Cockerill <i>ads.</i> Gunnell, 79 Ill. 79.....	47
Coffee <i>ads.</i> Phillips, 17 Ill. 154.....	357
Cohen <i>ads.</i> Farwell, 138 Ill. 216.....	57
Commercial Hotel Co. <i>ads.</i> Reichwald, 106 Ill. 439.....	295
Commissioners of Drainage District v. Griffin, 134 Ill. 330.....	140, 201
Commissioners of Highways v. Supervisors of Carthage, 27 Ill. 140.....	200
Commissioners of Highways <i>ads.</i> Chaplin, 126 Ill. 264.....	198
Commissioners of Highways <i>ads.</i> Deer, 109 Ill. 379.....	196
Commissioners of Highways <i>ads.</i> Dierks, 142 Ill. 197.....	277
Commissioners of Highways v. Harper, 38 Ill. 105.....	196
Comstock <i>ads.</i> Dean, 32 Ill. 173.....	309
Concordia Cemetery Ass. v. Minnesota and N. W. R. R. Co. 121 Ill. 199.....	572
Conlan <i>ads.</i> Pennsylvania Co. 101 Ill. 93.....	105
Connaghan v. The People, 88 Ill. 460.....	190
Connecticut M. L. Ins. Co. <i>ads.</i> Chicago Artesian Well Co. 57 Ill. 424.....	403
Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481.....	361

	PAGE.
Conway <i>ads.</i> City of Joliet, 119 Ill. 492 .....	178
Cook v. Patrick, 135 Ill. 499 .....	206
Coolbaugh v. Huck, 86 Ill. 600 .....	498
Cope <i>ads.</i> Lehnndorf, 122 Ill. 317 .....	225
Copeland <i>ads.</i> Ogilvie, 145 Ill. 98 .....	578
Coughran v. Gutchens, 18 Ill. 390 .....	610
Covington v. City of East St. Louis, 78 Ill. 548 .....	201
Cox v. Garst, 105 Ill. 342 .....	474
Cox <i>ads.</i> Sawyer, 63 Ill. 130 .....	358
Crabtree v. Reed, 50 Ill. 207 .....	540
Crandall v. Dawson, 1 Gilm. 556 .....	146
Craw v. Village of Tolono, 96 Ill. 256 .....	86
Crook v. The People, 16 Ill. 534 .....	423
Cullerton <i>ads.</i> Sanitary District of Chicago, 147 Ill. 385 .....	625
Curtenius <i>ads.</i> Toledo, Peoria and Warsaw Ry. Co. 65 Ill. 120 .....	474
Cushman <i>ads.</i> Sutphen, 35 Ill. 186 .....	148
Cutler v. Callison, 72 Ill. 113 .....	579

## D

Dale <i>ads.</i> Aurora, 90 Ill. 46 .....	105
Darlington v. Chamberlin, 120 Ill. 585 .....	361
Darst v. Murphy, 119 Ill. 343 .....	21
Davis v. Dresback, 81 Ill. 393 .....	242
Davis v. Town of Litchfield, 145 Ill. 313 .....	86
Davis <i>ads.</i> Mahony, 44 Ill. 289 .....	114
Davis v. The People, 114 Ill. 86 .....	189
Dawson <i>ads.</i> Crandall, 1 Gilm. 556 .....	146
Day <i>ads.</i> Van Buskirk, 32 Ill. 260 .....	440
Day <i>ads.</i> Gormley, 114 Ill. 185 .....	199
Dean v. Comstock, 32 Ill. 173 .....	309
Deer v. Comrs. of Highways, 109 Ill. 379 .....	196
Develing <i>ads.</i> Walton, 61 Ill. 206 .....	426
Dickerson <i>ads.</i> Phillips, 85 Ill. 11 .....	559
Dickey v. Reed, 78 Ill. 261 .....	426
Dickson <i>ads.</i> Chicago, Burlington and Quincy R. R. Co. 88 Ill. 431 .....	537
Diedrich <i>ads.</i> The People, 141 Ill. 669 .....	423
Dierks v. Comrs. of Highways, 142 Ill. 197 .....	277
Dietrich <i>ads.</i> Green, 114 Ill. 636 .....	215
Dix v. Mercantile Ins. Co. 22 Ill. 277 .....	249
Dodge <i>ads.</i> Sprague, 48 Ill. 142 .....	146
Dole <i>ads.</i> Rue, 107 Ill. 275 .....	24
Donlin v. Bradley, 119 Ill. 412 .....	207
Doolittle v. Galena and Chicago Union R. R. Co. 14 Ill. 381 .....	139
Doolittle v. Jenkins, 55 Ill. 400 .....	226
Doolittle <i>ads.</i> Jenkins, 69 Ill. 415 .....	215
Dormady v. State Bank of Illinois, 2 Scam. 236 .....	145

	PAGE
Dougherty v. The People, 118 Ill. 163.....	407
Doyle v. Murphy, 22 Ill. 502.....	215
Drainage District <i>ads.</i> Bodman, 132 Ill. 440.....	197
Dresback <i>ads.</i> Davis, 81 Ill. 393.....	242
Dressor v. McCord, 96 Ill. 389.....	168
Drovers' Nat. Bank v. O'Hare, 119 Ill. 646.....	501
Drury v. Holden, 121 Ill. 130.....	218
Dunham v. Village of Hyde Park, 75 Ill. 371.....	96
Dunham <i>ads.</i> Village of Hyde Park, 85 Ill. 569.....	376
Dunleavy <i>ads.</i> Chicago and Northwestern Ry. Co. 129 Ill. 132.....	194, 326
Dunleavy <i>ads.</i> South Park Comrs. 91 Ill. 49.....	383
Dupuis v. Chicago and North Wisconsin Ry. Co. 115 Ill. 97.....	377

## E

Earl v. The People, 73 Ill. 329.....	192
Earl v. The People, 99 Ill. 123.....	625
East St. Louis, City of, <i>ads.</i> Covington, 78 Ill. 548.....	201
East St. Louis <i>ads.</i> Louisville and Nashville R. R. Co. 134 Ill. 663. 89, 621	
East St. Louis, City of, <i>ads.</i> St. John, 136 Ill. 207.....	507
East St. Louis Electric Ry. Co. v. Cauley, 148 Ill. 490.....	11
Eaton <i>ads.</i> Chicago, Peoria and St. Louis Ry. Co. 136 Ill. 9.....	381
Eaton <i>ads.</i> City of Elgin, 83 Ill. 535.....	375
Eberhardt v. Chicago, Milwaukee and St. Paul Ry. Co. 70 Ill. 347.....	374
Ebert <i>ads.</i> Illinois Central R. R. Co. 74 Ill. 399.....	536
Edsall <i>ads.</i> Phillips, 127 Ill. 547.....	164
Elgin, City of, v. Eaton, 83 Ill. 535.....	375
Ellett <i>ads.</i> Pennsylvania Co. 132 Ill. 654.....	361
Emerson v. Western Union Ry. Co. 75 Ill. 176.....	372
English <i>ads.</i> McDonald, 85 Ill. 232.....	595
Ennis v. Ennis, 110 Ill. 78.....	140
Ennor v. Thompson, 46 Ill. 220.....	21
Enos v. City of Springfield, 113 Ill. 65.....	83
Evans v. Lewis, 121 Ill. 478.....	197

## F

Fagan v. City of Chicago, 84 Ill. 231.....	96, 621
Farwell v. Cohen, 138 Ill. 216.....	57
Farwell v. Nilsson, 133 Ill. 45.....	56
Faulkner <i>ads.</i> Ray, 73 Ill. 469.....	164
Feaman <i>ads.</i> Preschbaker, 32 Ill. 481.....	21
Fell <i>ads.</i> Chicago and Rock Island R. R. Co. 22 Ill. 333.....	139
Field v. Barling, 149 Ill. 556.....	530
Finch <i>ads.</i> Hyslop, 99 Ill. 171.....	196
Fireman's Ins. Co. v. Peck, 126 Ill. 494.....	11
First Baptist Church v. Hyde, 40 Ill. 150.....	164
First Nat. Bank <i>ads.</i> Warren, 149 Ill. 9.....	295
Fischer <i>ads.</i> Thomas, 71 Ill. 576.....	535

	PAGE.
<b>Fisher v. Bennehoff</b> , 121 Ill. 426.....	579
<b>Fisher ads. Chicago and Alton R. R. Co.</b> 141 Ill. 625.....	555
<b>Fisher v. Green</b> , 142 Ill. 80.....	24
<b>Fleming v. Carter</b> , 70 Ill. 288.....	115
<b>Foreman ads. Harshbarger</b> , 81 Ill. 364.....	219
<b>Fort v. Richey</b> , 128 Ill. 502.....	218
<b>Fort Dearborn Lodge v. Klein</b> , 115 Ill. 177.....	310
<b>Foster ads. Westchester Fire Ins. Co.</b> 90 Ill. 121.....	251
<b>Foulke ads. Martin</b> , 114 Ill. 206.....	11
<b>Fouts ads. Metcalf</b> , 27 Ill. 113.....	114
<b>Francis ads. Chicago and Pacific Ry. Co.</b> 70 Ill. 238.....	373
<b>Frazier ads. Manning</b> , 96 Ill. 279.....	226
<b>Freeport, Town of, ads. Kuehner</b> , 143 Ill. 92.....	83
<b>Fry ads. O'Brian</b> , 82 Ill. 274.....	243
<b>Fulford ads. Graham</b> , 73 Ill. 596.....	268

## G

<b>Gage v. City of Chicago</b> , 143 Ill. 157.....	620
<b>Gain ads. Butler &amp; McCracken</b> , 128 Ill. 23.....	631
<b>Galena and Chicago Union R. R. Co. ads. Doolittle</b> , 14 Ill. 381.....	139
<b>Galena and Chicago Union R. R. Co. v. Jacobs</b> , 20 Ill. 478.....	556
<b>Galesburg, City of, v. Hawkinson</b> , 75 Ill. 152.....	201
<b>Gallaher v. Herbert</b> , 117 Ill. 160.....	151
<b>Gannon v. The People</b> , 127 Ill. 507.....	191
<b>Garritty v. The People</b> , 107 Ill. 162.....	188
<b>Garst ads. Cox</b> , 105 Ill. 342.....	474
<b>Gattman ads. Hamburg-American Packet Co.</b> 127 Ill. 598.....	361
<b>Gentleman v. Soule</b> , 32 Ill. 279.....	133
<b>Germania Ins. Co. v. Klewer</b> , 129 Ill. 612.....	146
<b>Glennon v. Burton</b> , 144 Ill. 551.....	140
<b>Gillen ads. Union Rolling Mill Co.</b> 100 Ill. 52.....	537
<b>Gockley ads. Kilgour</b> , 83 Ill. 109.....	115
<b>Godfrey v. Buckmaster</b> , 1 Scam. 450.....	349
<b>Godfrey ads. Nelson</b> , 12 Ill. 22.....	529
<b>Goodrich v. City of Minonk</b> , 62 Ill. 121.....	610
<b>Goodwillie v. City of Lake View</b> , 137 Ill. 51.....	572
<b>Gormley v. Day</b> , 114 Ill. 185.....	199
<b>Gottmanhausen ads. Bauer</b> , 65 Ill. 499.....	578
<b>Goudy ads. Stickney</b> , 132 Ill. 213.....	436
<b>Gould v. Howe</b> , 127 Ill. 251.....	11
<b>Gould ads. Knickerbocker Ins. Co.</b> 80 Ill. 395.....	137
<b>Graham v. Fulford</b> , 73 Ill. 596.....	268
<b>Graham v. The People</b> , 115 Ill. 566.....	11
<b>Green v. Chicago</b> , 97 Ill. 371.....	379
<b>Green v. Dietrich</b> , 114 Ill. 636.....	215
<b>Green ads. Fisher</b> , 142 Ill. 80.....	24

	PAGE.
Green v. City of Springfield, 130 Ill. 515.....	84
Gridley v. Hopkins, 84 Ill. 528.....	308
Griffey <i>ads.</i> Wright, 147 Ill. 496.....	574
Griffin <i>ads.</i> Comrs. of Drainage District, 134 Ill. 330.....	140, 201
Guild v. Hall, 91 Ill. 223.....	269
Gunnell v. Cockerill, 79 Ill. 79.....	47
Gutchens <i>ads.</i> Coughran, 18 Ill. 390.....	610

## H

Haas v. Building Society, 89 Ill. 498.....	242
Hadsell <i>ads.</i> Perkins, 50 Ill. 216.....	164
Haecker <i>ads.</i> Wilson, 85 Ill. 352.....	44Q
Hageman v. Hageman, 129 Ill. 164.....	121
Hall <i>ads.</i> Chicago, Milwaukee and St. Paul Ry. Co. 90 Ill. 42.....	376
Hall <i>ads.</i> Guild, 91 Ill. 223.....	269
Hall <i>ads.</i> Indianapolis, Bloom. and Western R. R. Co. 106 Ill. 375..	326
Hall <i>ads.</i> Purdy, 134 Ill. 298.....	559
Haller <i>ads.</i> St. Louis, Vandalia and Terre Haute R. R. Co. 82 Ill. 208	375
Halsey <i>ads.</i> Chicago, Milwaukee and St. Paul R. R. Co. 133 Ill. 248.	555
Ham <i>ads.</i> Simpson, 78 Ill. 203.....	474
Hamburg-American Packet Co. v. Gattman, 127 Ill. 598.....	361
Hanford v. Prouty, 133 Ill. 355.....	58
Hanna v. Read, 103 Ill. 596.....	574
Hansen v. Meyer, 81 Ill. 321.....	152
Harper <i>ads.</i> Comrs. of Highways, 38 Ill. 105.....	196
Harrington <i>ads.</i> Beal, 116 Ill. 113.....	225
Harris v. McIntyre, 118 Ill. 275.....	207
Harshbarger v. Foreman, 81 Ill. 364.....	219
Harwood v. City of Bloomington, 124 Ill. 48.....	378
Havighorst v. Lindberg, 67 Ill. 463.....	634
Hawkinson v. City of Galesburg, 75 Ill. 152.....	201
Hayes v. Ottawa R. R. Co. 54 Ill. 373.....	371
Heinsen v. Lamb, 117 Ill. 549.....	610
Heiss <i>ads.</i> Penn Mutual Life Ins. Co. 141 Ill. 35.....	571
Hemmer <i>ads.</i> Wolfer, 144 Ill. 554.....	121
Hendricks <i>ads.</i> Pierson, 88 Ill. 34.....	268
Henke v. Lenfers, 73 Ill. 405.....	475, 566
Henry <i>ads.</i> Keithsburg and Eastern R. R. Co. 79 Ill. 290.....	375, 381
Herbert <i>ads.</i> Gallaher, 117 Ill. 160.....	151
Hide and Leather Nat. Bank v. Rehm, 126 Ill. 461.....	58
Hier v. Kaufman, 134 Ill. 223.....	58
Hill v. Crandall, 52 Ill. 70.....	426
Hillman <i>ads.</i> City of Aurora, 90 Ill. 61.....	105, 173
Hinkson <i>ads.</i> City of Morrison, 87 Ill. 587.....	594
Hitchcock v. Watson, 18 Ill. 289.....	216, 222
Hitt <i>ads.</i> Kerr, 75 Ill. 51.....	579

	PAGE.
<b>Hodson v. McConnell</b> , 12 Ill. 170.....	168
<b>Hoffman ads. The People</b> , 116 Ill. 594.....	198
<b>Hoge v. The People</b> , 117 Ill. 35.....	189
<b>Holden ads. Drury</b> , 121 Ill. 130.....	218
<b>Holland ads. Chicago and Eastern R. R. Co.</b> 122 Ill. 461.....	397
<b>Hood ads. Quincy Coal Co.</b> 77 Ill. 68.....	557
<b>Hopkins ads. Gridley</b> , 84 Ill. 528.....	308
<b>Howe ads. Gould</b> , 127 Ill. 251.....	11
<b>Huck ads. Coolbaugh</b> , 86 Ill. 600.....	498
<b>Hudson ads. Price</b> , 125 Ill. 284.....	49
<b>Hurd v. Case</b> , 32 Ill. 45.....	403
<b>Hyde ads. First Baptist Church</b> , 40 Ill. 150.....	164
<b>Hyde Park, Village of, ads. Dunham</b> , 75 Ill. 371.....	96
<b>Hyde Park, Village of, v. Dunham</b> , 85 Ill. 569.....	376
<b>Hyde Park v. Washington Ice Co.</b> 117 Ill. 236.....	572
<b>Hynes ads. Booth</b> , 54 Ill. 363.....	218
<b>Hyslop v. Finch</b> , 99 Ill. 171.....	196

## I

<b>Illinois Central R. R. Co. v. City of Chicago</b> , 141 Ill. 586.....	597, 621
<b>Illinois Central R. R. Co. v. Ebert</b> , 74 Ill. 399.....	536
<b>Illinois Central R. R. Co. v. Johnson</b> , 40 Ill. 35.....	358
<b>Illinois Central R. R. Co. v. The People</b> , 121 Ill. 310.....	209
<b>Illinois Central R. R. Co. v. Welch</b> , 52 Ill. 183.....	397
<b>Illinois Central R. R. Co. v. Weldon</b> , 52 Ill. 290.....	555
<b>Illinois Central R. R. Co. v. Willenborg</b> , 117 Ill. 203.....	597
<b>Illinois Mutual Fire Ins. Co. ads. Stephens</b> , 43 Ill. 331.....	243
<b>Illinois and St. Louis R. R. and Coal Co. ads. The People</b> , 122 Ill. 506.....	361
<b>Illinois Transportation Co. ads. City of Alton</b> , 12 Ill. 38.....	523
<b>Indianapolis, Bloomington and Western R. R. Co. v. Hall</b> , 106 Ill. 375.....	326
<b>Indianapolis and St. Louis R. R. Co. v. Morgenstern</b> , 106 Ill. 216.....	105
<b>Ingalls, In re will of</b> , 148 Ill. 287.....	258
<b>Ingraham v. The People</b> , 94 Ill. 428.....	424

## J

<b>Jackson ads. Chicago and Northwestern R. R. Co.</b> 55 Ill. 492.....	397
<b>Jackson v. The People</b> , 40 Ill. 405.....	407
<b>Jacksonville, City of, v. Jacksonville Ry. Co.</b> 67 Ill. 540.....	523
<b>Jacksonville Ry. Co. ads. City of Jacksonville</b> , 67 Ill. 540.....	523
<b>Jacobs ads. Galena and Chicago Union R. R. Co.</b> 20 Ill. 478.....	556
<b>Jeffries ads. Peyton</b> , 50 Ill. 143.....	474
<b>Jenkins ads. Doolittle</b> , 55 Ill. 400.....	226
<b>Jenkins v. Doolittle</b> , 69 Ill. 415.....	215
<b>Johnsen ads. Lake Shore and Michigan South. Ry. Co.</b> 135 Ill. 641.....	555
<b>Johnson ads. Arnold</b> , 1 Scam. 196.....	226
<b>Johnson ads. Illinois Central R. R. Co.</b> 40 Ill. 35.....	358

	PAGE.
Johnson <i>ads.</i> Wabash, St. Louis and Pacific Ry. Co. 108 Ill. 11.....	544
Joliet, Aurora and Northern Ry. Co. v. Velie, 140 Ill. 59.....	144, 397
Joliet, City of, v. Conway, 119 Ill. 492.....	178
Joliet, City of, v. Weston, 123 Ill. 641.....	397
Joliet, Lock. and Aurora Ry. Co. <i>ads.</i> C. and A. R. R. Co. 105 Ill. 398.	597
Jones v. Buffum, 50 Ill. 278.....	114
Jones <i>ads.</i> Tolman, 114 Ill. 147.....	426

## K

Kaufman <i>ads.</i> Hier, 134 Ill. 223.....	58
Keefe <i>ads.</i> City of Chicago, 114 Ill. 222.....	533
Keegan v. Kinnare, 123 Ill. 280.....	268
Keifer <i>ads.</i> Consolidated Ice Machine Co. 134 Ill. 481.....	361
Keithsburg and Eastern R. R. Co. v. Henry, 79 Ill. 290.....	375, 381
Kerr v. Hitt, 75 Ill. 51.....	579
Kiernan v. Chicago, Santa Fe and California R. R. Co. 123 Ill. 188...	378
Kilgour v. Gockley, 83 Ill. 109.....	115
Kingsbury v. Burnside, 58 Ill. 310.....	49
Kingsbury v. Powers, 131 Ill. 182.....	468
Kinnare <i>ads.</i> Keegan, 123 Ill. 280.....	268
Kinney <i>ads.</i> Albin, 96 Ill. 214.....	536
Kirby <i>ads.</i> St. Louis, Jerseyville and Springfield R. R. Co. 104 Ill. 347.	376
Klancy <i>ads.</i> Morris, 51 Ill. 451.....	164
Klein <i>ads.</i> Fort Dearborn Lodge, 115 Ill. 177.....	310
Klewer <i>ads.</i> Germania Ins. Co. 129 Ill. 612.....	146
Knickerbocker Ins. Co. v. Gould, 80 Ill. 395.....	137
Koerner <i>ads.</i> Ogle, 140 Ill. 170.....	243
Kreigh v. City of Chicago, 86 Ill. 407.....	524
Kuehner v. Town of Freeport, 143 Ill. 92.....	83
Kyle v. Town of Logan, 87 Ill. 64.....	133

## L

Laack <i>ads.</i> Pullman Palace Car Co. 143 Ill. 242.....	556
Lake, Town of, <i>ads.</i> Walters, 129 Ill. 23.....	531
Lake Shore and Michigan South. Ry. Co. <i>ads.</i> Blanchard, 126 Ill. 416	356
Lake Shore and Mich. South. Ry. Co. v. City of Chicago, 148 Ill. 509	597
Lake Shore and Michigan Southern Ry. Co. v. Johnsen, 135 Ill. 641	555
Lake View, City of, <i>ads.</i> Goodwillie, 137 Ill. 51.....	572
Lamb <i>ads.</i> Heinsen, 117 Ill. 549.....	610
Latham <i>ads.</i> City of Bloomington, 142 Ill. 462.....	576
Laubheimer <i>ads.</i> Seligman, 58 Ill. 124.....	243
Laurie <i>ads.</i> Peoria Ry. Co. 63 Ill. 264.....	371
Lavalle <i>ads.</i> Cobb, 89 Ill. 331.....	115
Lee v. Town of Mound Station, 118 Ill. 304.....	310
Legare v. City of Chicago, 139 Ill. 46.....	593
Legg <i>ads.</i> Primm, 67 Ill. 500.....	218



	PAGE.
Lehndorf v. Cope, 122 Ill. 317.....	225
Leigh v. The People, 113 Ill. 372.....	189
LeMoyne <i>ads.</i> Nat. Bank, 127 Ill. 254.....	216
Lenfers v. Henke, 73 Ill. 405.....	475, 566
Lennahan v. O'Keefe, 107 Ill. 622.....	474
Lester v. Berkowitz, 125 Ill. 307.....	416
Lewis <i>ads.</i> Chicago, Rock Island and Pacific R. R. Co. 109 Ill. 120..	356
Lewis <i>ads.</i> Evans, 121 Ill. 478.....	197
Libby v. Scherman, 146 Ill. 554.....	537
Lindberg <i>ads.</i> Havighorst, 67 Ill. 463.....	634
Litchfield, Town of, <i>ads.</i> Davis, 145 Ill. 313.....	86
Lookridge <i>ads.</i> McNulty, 137 Ill. 270.....	555
Logan, Town of, <i>ads.</i> Kyle, 87 Ill. 64.....	133
Louisville and Nashville R. R. Co. v. East St. Louis, 134 Ill. 663..	89, 621
Lowenthal v. Streng, 90 Ill. 74.....	536
Lusk <i>ads.</i> Wiggins, 12 Ill. 132.....	49
Lyons v. The People, 68 Ill. 271.....	445

## M

Magenly <i>ads.</i> Robson, 28 Ill. 426.....	395
Mahony v. Davis, 44 Ill. 289.....	114
Major <i>ads.</i> City of Chicago, 18 Ill. 349.....	335
Manning v. Frazier, 96 Ill. 279.....	226
Mansfield v. Moore, 124 Ill. 133.....	556
Martin <i>ads.</i> Calumet Iron and Steel Co. 115 Ill. 358.....	556
Martin v. Foulke, 114 Ill. 206.....	11
Martin v. Morelock, 32 Ill. 485.....	626
Mason v. Bair, 33 Ill. 194.....	217
Mason v. Buckmaster, Beecher's Breese, 27.....	417
Mason <i>ads.</i> City of Shawneetown, 82 Ill. 337.....	383
Matson <i>ads.</i> Bennett, 41 Ill. 332.....	243
May v. Baker, 15 Ill. 89.....	164
May v. The People, 60 Ill. 119.....	190
Maywood Co. v. Village of Maywood, 118 Ill. 61.....	309
McClintock <i>ads.</i> Stevenson, 141 Ill. 604.....	206
McConkey v. Smith, 73 Ill. 313.....	500
McConnell <i>ads.</i> Hodson, 12 Ill. 170.....	168
McConnel v. Mutual Ins. Co. 18 Ill. 228.....	146
McCord <i>ads.</i> Dressor, 96 Ill. 389.....	168
McCord <i>ads.</i> Powell, 121 Ill. 330.....	361
McDeed v. McDeed, 67 Ill. 545.....	540
McDonald v. Allen, 128 Ill. 521.....	361
McDonald v. English, 85 Ill. 232.....	595
McDonough v. McManus, 107 Ill. 95.....	196
McDougall <i>ads.</i> Wabash, St. Louis and Pacific Ry. Co. 126 Ill. 111..	379
McDowell <i>ads.</i> Smith, 148 Ill. 51.....	529

	PAGE.
McFall <i>ads.</i> Ragland, 137 Ill. 81.....	295
McGinn <i>ads.</i> City of Chicago, 51 Ill. 266.....	523
McIntyre <i>ads.</i> Harris, 118 Ill. 275.....	207
McLean, County of, <i>v.</i> City of Bloomington, 106 Ill. 209.....	87, 531
McManus <i>v.</i> McDonough, 107 Ill. 95.....	196
McMath <i>ads.</i> Ottawa, Oswego and Fox Riv. Valley R. R. Co. 91 Ill. 104.....	299
McMullen <i>ads.</i> West Chicago Park Comrs. 134 Ill. 170.....	524
McNulty <i>v.</i> Lockridge, 137 Ill. 270.....	555
McReynolds <i>v.</i> Burlington and Ohio River Ry. Co. 106 Ill. 152.....	376
Meek <i>ads.</i> Moshier, 80 Ill. 79.....	219
Mercantile Ins. Co. <i>ads.</i> Dix, 22 Ill. 277.....	249
Merrill <i>ads.</i> Atkin, 39 Ill. 62.....	473
Metcalf <i>v.</i> Fouts, 27 Ill. 113.....	114
Meyer <i>ads.</i> Hansen, 81 Ill. 321.....	152
Mick <i>ads.</i> Weber, 131 Ill. 533.....	55
Miller <i>v.</i> The People, 39 Ill. 457.....	190
Miller <i>v.</i> Thomas, 14 Ill. 430.....	21
Miller <i>v.</i> Trustees of Schools, 88 Ill. 26.....	140
Minnesota and Northw. R. R. Co. <i>ads.</i> Cem. Ass. 121 Ill. 199.....	378, 383, 572
Minonk, City of, <i>ads.</i> Goodrich, 62 Ill. 121.....	610
Missouri Furnace Co. <i>v.</i> Abend, 107 Ill. 44.....	105
Moore <i>ads.</i> Mansfield, 124 Ill. 133.....	556
Moore <i>ads.</i> Richmond, 107 Ill. 429.....	259
Morelock <i>ads.</i> Martin, 32 Ill. 485.....	626
Morgenstern <i>ads.</i> Indianapolis and St. Louis R. R. Co. 106 Ill. 216.....	105
Morris <i>ads.</i> Chicago, Rock Island and Pacific Ry. Co. 26 Ill. 400.....	557
Morris <i>v.</i> Cheney, 51 Ill. 451.....	168
Morris <i>v.</i> Klancy, 51 Ill. 451.....	164
Morrison, City of, <i>v.</i> Hinkson, 87 Ill. 587.....	594
Moshier <i>v.</i> Meek, 80 Ill. 79.....	219
Mound Station, Town of, <i>ads.</i> Lee, 118 Ill. 304.....	310
Mulberry <i>v.</i> Mulberry, 50 Ill. 67.....	461
Mullins <i>v.</i> The People, 110 Ill. 42.....	188
Murphy <i>ads.</i> Darst, 119 Ill. 343.....	21
Murphy <i>ads.</i> Doyle, 22 Ill. 502.....	215
Murray <i>v.</i> City of Virginia, 91 Ill. 558.....	197
Mutual Ins. Co. <i>ads.</i> McConnel, 18 Ill. 228.....	146
Myers <i>v.</i> Union Nat. Bank, 128 Ill. 478.....	361

## N

National Bank <i>v.</i> LeMoynes, 127 Ill. 254.....	216
Nelson <i>v.</i> Godfrey, 12 Ill. 22.....	529
Niagara Fire Ins. Co. <i>v.</i> Scammon, 144 Ill. 500.....	252
Nilsson <i>ads.</i> Farwell, 133 Ill. 45.....	56
Noble, In the matter of, 124 Ill. 266.....	257
Northwestern Distilling Co. <i>v.</i> Brant, 69 Ill. 658.....	356

## O

## PAGE.

O'Brennan <i>ads.</i> City of Chicago, 65 Ill. 160.....	178
O'Brian <i>v.</i> Fry, 82 Ill. 274.....	243
O'Connor <i>ads.</i> Chicago and Eastern Illinois R. R. Co. 119 Ill. 586...	105
O'Hare <i>ads.</i> Drovers' Nat. Bank, 119 Ill. 646.....	501
O'Keefe <i>ads.</i> Lennahan, 107 Ill. 620.....	474
O'Neil <i>v.</i> O'Neil, 123 Ill. 360.....	145
Ogilvie <i>v.</i> Copeland, 145 Ill. 98.....	578
Ogle <i>v.</i> Koerner, 140 Ill. 170.....	243
Oswald <i>v.</i> Wolf, 129 Ill. 200.....	278
Otmer <i>v.</i> The People, 76 Ill. 149.....	191
Ottawa, Oswego and Fox River Valley R. R. Co. <i>v.</i> McMath, 91 Ill. 104	299
Ottawa R. R. Co. <i>ads.</i> Hayes, 54 Ill. 373.....	371

## P

Page <i>v.</i> Chicago, Milwaukee and St. Paul Ry. Co. 70 Ill. 324.....	373
Page <i>v.</i> The People, 99 Ill. 418.....	160
Palmer <i>v.</i> Logan, 3 Scam. 56.....	145
Palmer <i>v.</i> Sanger, 143 Ill. 34.....	575
Patrick <i>ads.</i> Cook, 135 Ill. 499.....	206
Peak <i>v.</i> The People, 76 Ill. 289.....	540
Pearson <i>v.</i> Zehr, 125 Ill. 573.....	197
Peck <i>ads.</i> Fireman's Ins. Co. 126 Ill. 494.....	11
Peck <i>ads.</i> Thayer, 93 Ill. 357.....	216
Penn Mutual Life Ins. Co. <i>v.</i> Heiss, 141 Ill. 35.....	571
Pennsylvania Co. <i>v.</i> Backes, 133 Ill. 255.....	361
Pennsylvania Co. <i>v.</i> Conlan, 101 Ill. 93.....	105
Pennsylvania Co. <i>v.</i> Ellett, 132 Ill. 654.....	361
Pensoneau <i>v.</i> Pulliam, 47 Ill. 58.....	242
People <i>ads.</i> Ackerson, 124 Ill. 563.....	187
— <i>v.</i> Anthony, 129 Ill. 218.....	610
— <i>ads.</i> Bartholomew, 104 Ill. 608.....	74
— <i>ads.</i> Bennett, 96 Ill. 602.....	445
— <i>v.</i> Board of Education of the City of Quincy, 101 Ill. 312....	197
— <i>ads.</i> Bressler, 117 Ill. 422.....	189
— <i>ads.</i> Bulliner, 95 Ill. 394.....	76
— <i>v.</i> Chicago and Alton R. R. Co. 55 Ill. 111.....	209
— <i>ads.</i> Chicago and Alton R. R. Co. 67 Ill. 19.....	209
— <i>ads.</i> Chicago, Burlington and Quincy R. R. Co. 77 Ill. 443....	209
— <i>ads.</i> Chicago and Northwestern Ry. Co. 56 Ill. 365.....	209
— <i>ads.</i> Connaghan, 88 Ill. 460.....	190
— <i>ads.</i> Crook, 16 Ill. 534.....	423
— <i>ads.</i> Davis, 114 Ill. 86.....	189
— <i>v.</i> Diedrich, 141 Ill. 669.....	423
— <i>ads.</i> Dougherty, 118 Ill. 163.....	407
— <i>ads.</i> Earll, 73 Ill. 329.....	192

	PAGE.
People <i>ads.</i> Earl, 99 Ill. 123.....	625
— <i>ads.</i> Gannon, 127 Ill. 507.....	191
— <i>ads.</i> Garrity, 107 Ill. 162.....	188
— <i>ads.</i> Graham, 115 Ill. 566.....	11
— <i>v.</i> Hoffman, 116 Ill. 594.....	198
— <i>ads.</i> Hoge, 117 Ill. 35.....	189
— <i>ads.</i> Illinois Central R. R. Co. 121 Ill. 310.....	209
— <i>v.</i> Illinois and St. Louis R. R. and Coal Co. 122 Ill. 506.....	361
— <i>ads.</i> Ingraham, 94 Ill. 428.....	424
— <i>ads.</i> Jackson, 40 Ill. 405.....	407
— <i>ads.</i> Leigh, 113 Ill. 372.....	189
— <i>ads.</i> Lyons, 68 Ill. 271.....	445
— <i>ads.</i> May, 60 Ill. 119.....	190
— <i>ads.</i> Miller, 39 Ill. 457.....	190
— <i>ads.</i> Mullins, 110 Ill. 42.....	188
— <i>ads.</i> Page, 99 Ill. 418.....	160
— <i>ads.</i> Peak, 76 Ill. 289.....	540
— <i>v.</i> Reynolds, 5 Gilm. 1.....	198
— <i>ads.</i> Rice, 38 Ill. 435.....	407
— <i>v.</i> Salomon, 51 Ill. 37.....	524
— <i>ads.</i> Sattler, 59 Ill. 68.....	407
— <i>ads.</i> Spies, 122 Ill. 1.....	190
— <i>ads.</i> Starkey, 17 Ill. 17.....	74
— <i>ads.</i> Steffy, 130 Ill. 98.....	11
— <i>ads.</i> Sullivan, 114 Ill. 26.....	407
— <i>ads.</i> Taylor, 66 Ill. 322.....	87, 531
— <i>ads.</i> Trumbo, 75 Ill. 564.....	197
— <i>v.</i> Walsh, 96 Ill. 232.....	526
— <i>ads.</i> Wallahan, 40 Ill. 102.....	610
— <i>v.</i> Whitcomb, 55 Ill. 176.....	197
— <i>ads.</i> White, 94 Ill. 607.....	86
— <i>v.</i> Williamson, 13 Ill. 661.....	196
— <i>v.</i> Wright, 70 Ill. 388.....	95
Peoria Ry. Co. <i>v.</i> Laurie, 63 Ill. 264.....	371
Perkins <i>v.</i> Hadsell, 50 Ill. 216.....	164
Peterson <i>ads.</i> Bonner, 44 Ill. 253.....	474
Peyton <i>v.</i> Jeffries, 50 Ill. 143.....	474
Phelps <i>v.</i> Reeder, 39 Ill. 172.....	222
Phillips <i>v.</i> Coffee, 17 Ill. 154.....	357
Phillips <i>v.</i> Edsall, 127 Ill. 547.....	164
Pierson <i>v.</i> Hendricks, 88 Ill. 34.....	268
Pitchman <i>ads.</i> Stumer, 124 Ill. 250.....	397
Powell <i>v.</i> McCord, 121 Ill. 330.....	361
Powell <i>ads.</i> Riggs, 142 Ill. 453.....	146
Powers <i>ads.</i> Kingsbury, 131 Ill. 182.....	468
Preschbaker <i>v.</i> Feaman, 32 Ill. 481.....	21

	PAGE.
Preston v. Spaulding, 120 Ill. 208.....	56
Price v. Hudson, 125 Ill. 284.....	49
Primm v. Legg, 67 Ill. 500.....	218
Prouty <i>ads.</i> Hanford, 133 Ill. 355.....	58
Pulliam <i>ads.</i> Pensoneau, 47 Ill. 58.....	242
Pullman Palace Car Co. v. Bluhm, 109 Ill. 20.....	397
Pullman Palace Car Co. v. Laack, 143 Ill. 242.....	556
Purdy v. Hall, 134 Ill. 298.....	559

## Q

Quincy, Board of Educa'n of the City of, <i>ads.</i> The People, 101 Ill. 312.....	197
Quincy, City of, v. Bull, 106 Ill. 337.....	199, 593
Quincy Coal Co. v. Hood, 77 Ill. 68.....	557

## R

Raber <i>ads.</i> Zearing, 74 Ill. 413.....	309
Race v. Weston, 86 Ill. 92.....	440
Ragland v. McFall, 137 Ill. 81.....	295
Ray v. Faulkner, 73 Ill. 469.....	164
Read <i>ads.</i> Hanna, 102 Ill. 596.....	574
Reaper City Ins. Co. v. Brennan, 58 Ill. 159.....	248
Reddick <i>ads.</i> Ross, 1 Scam. 73.....	198
Redlich v. Bauerlee, 98 Ill. 137.....	216
Reed <i>ads.</i> Crabtree, 50 Ill. 207.....	540
Reed <i>ads.</i> Dickey, 78 Ill. 261.....	426
Reed v. Reed, 135 Ill. 482.....	206
Reeder <i>ads.</i> Phelps, 39 Ill. 172.....	222
Reeve v. Smith, 113 Ill. 52.....	164
Rehm <i>ads.</i> Hide and Leather Nat. Bank, 126 Ill. 461.....	58
Reichwald v. Commercial Hotel Co. 106 Ill. 439.....	295
Reinbach <i>ads.</i> Wahle, 76 Ill. 322.....	279
Rendleman v. Rendleman, 118 Ill. 257.....	308
Renshaw <i>ads.</i> Voris, 49 Ill. 425.....	152
Reynolds <i>ads.</i> The People, 5 Gilm. 1.....	198
Rice v. The People, 38 Ill. 435.....	407
Richey <i>ads.</i> Fort, 128 Ill. 502.....	218
Richmond v. Moore, 107 Ill. 429.....	259
Riggs v. Powell, 142 Ill. 453.....	146
Rigney v. City of Chicago, 102 Ill. 64.....	382, 595
Rivard v. Walker, 39 Ill. 413.....	49
Robins v. Swain, 68 Ill. 197.....	403
Robson v. Magenly, 28 Ill. 426.....	395
Rockwell v. Servant, 63 Ill. 424.....	243
Ross v. Reddick, 1 Scam. 73.....	198
Rue v. City of Chicago, 66 Ill. 256.....	203
Rue v. Dole, 107 Ill. 275.....	24
Russell <i>ads.</i> Stow, 36 Ill. 20.....	115

S		PAGE.
Saathoff <i>ads.</i> Bitter, 98 Ill. 266.....		540
Salomon <i>ads.</i> The People, 51 Ill. 37.....		524
Sanger <i>ads.</i> Palmer, 143 Ill. 34.....		575
Sanitary District of Chicago <i>v.</i> Cullerton, 147 Ill. 385.....		625
Sattler <i>v.</i> The People, 59 Ill. 68.....		407
Sawyer <i>v.</i> Cox, 63 Ill. 130.....		358
Scammon <i>v.</i> City of Chicago, 42 Ill. 192.....		531
Scammon <i>ads.</i> Niagara Fire Ins. Co. 144 Ill. 500.....		252
Scherman <i>ads.</i> Libby, 146 Ill. 554.....		537
Schmidt <i>v.</i> Chicago and Northwestern Ry. Co. 83 Ill. 405.....		105
Schroeder <i>v.</i> Walsh, 120 Ill. 403.....		56
Schumers <i>ads.</i> Tedens, 112 Ill. 263.....		148
Schuttler <i>ads.</i> Tunesma, 114 Ill. 164.....		436
Scofield <i>v.</i> Tompkins, 95 Ill. 190.....		351
Scott <i>ads.</i> Baker, 62 Ill. 86.....	121,	199
Seely <i>ads.</i> Woodward, 11 Ill. 157.....		281
Seligman <i>v.</i> Laubheimer, 58 Ill. 124.....		243
Servant <i>ads.</i> Rockwell, 63 Ill. 424.....		243
Shaw <i>ads.</i> Yates, 24 Ill. 367.....		578
Shawneetown, City of, <i>v.</i> Mason, 82 Ill. 337.....		353
Shepherd <i>ads.</i> Trustees of Schools, 139 Ill. 114.....		139
Simpson <i>v.</i> Ham, 78 Ill. 203.....		474
Skiles <i>ads.</i> Switzer, 3 Gilm. 529.....		216
Skinner <i>v.</i> Baker, 79 Ill. 496.....		47
Smith <i>ads.</i> Beardsley, 139 Ill. 280.....		160
Smith <i>ads.</i> McConkey, 73 Ill. 313.....		500
Smith <i>v.</i> McDowell, 148 Ill. 51.....		529
Smith <i>ads.</i> Reeve, 113 Ill. 52.....		164
Snell <i>v.</i> City of Chicago, 133 Ill. 413.....		597
Soule <i>ads.</i> Gentleman, 32 Ill. 279.....		133
South Park Comrs. <i>v.</i> Dunlevy, 91 Ill. 49.....		383
Spaulding <i>ads.</i> Preston, 120 Ill. 208.....		56
Spencer <i>v.</i> Byars, 101 Ill. 429.....		47
Spies <i>v.</i> The People, 122 Ill. 1.....		190
Sprague <i>v.</i> Dodge, 48 Ill. 142.....		146
Springer <i>v.</i> City of Chicago, 135 Ill. 552.....	380,	621
Springfield, City of, <i>ads.</i> Enos, 113 Ill. 65.....		83
Springfield, City of, <i>ads.</i> Green, 130 Ill. 515.....		84
Springfield, City of, <i>ads.</i> Wilbur, 123 Ill. 395.....	84,	199
Starkey <i>v.</i> The People, 17 Ill. 17.....		74
Stack <i>v.</i> City of St. Louis, 85 Ill. 377.....		593
State <i>v.</i> Allen, 43 Ill. 456.....		500
State Bank of Illinois <i>ads.</i> Dormady, 2 Scam. 236.....		145
Steele, <i>In re</i> , 65 Ill. 322.....		468
Steele <i>v.</i> Clark, 77 Ill. 471.....		215

	PAGE.
<i>Steele ads. Webster</i> , 75 Ill. 545.....	164
<i>Steffy v. The People</i> , 130 Ill. 98.....	11
<i>Stein ads. Chicago and Pacific Ry. Co.</i> 75 Ill. 41.....	375
<i>Stephens v. Illinois Mutual Fire Ins. Co.</i> 43 Ill. 331.....	243
<i>Stevenson v. McClintock</i> , 141 Ill. 604.....	206
<i>Stickney v. Goudy</i> , 131 Ill. 213.....	436
<i>St. John v. City of East St. Louis</i> , 136 Ill. 207.....	507
<i>St. Louis, City of, ads. Stack</i> , 85 Ill. 377.....	593
<i>St. Louis, Jerseyville and Springfield R. R. Co. v. Kirby</i> , 104 Ill. 347.....	376
<i>St. Louis Nat. Stock Yards v. Wiggins Ferry Co.</i> 112 Ill. 384.....	281
<i>St. Louis Transfer Co. v. Canty</i> , 103 Ill. 423.....	197
<i>St. Louis, Vandalia and Terre Haute R. R. Co. v. Haller</i> , 82 Ill. 208.....	375
<i>Stow v. Russell</i> , 36 Ill. 20.....	115
<i>Strahan ads. Boyd</i> , 36 Ill. 358.....	461
<i>Strawn v. Strawn's Heirs</i> , 50 Ill. 256.....	474
<i>Streng ads. Loewenthal</i> , 90 Ill. 74.....	536
<i>Stumer v. Pitchman</i> , 124 Ill. 250.....	397
<i>Sullivan v. The People</i> , 114 Ill. 26.....	407
<i>Supervisors of Carthage v. Comrs. of Highways</i> , 27 Ill. 140.....	200
<i>Sutphen v. Cushman</i> , 35 Ill. 186.....	148
<i>Swain ads. Robins</i> , 68 Ill. 197.....	403
<i>Switzer v. Skiles</i> , 3 Gilm. 529.....	216

## T

<i>Taylor v. The People</i> , 66 Ill. 322.....	87, 531
<i>Tedens v. Schumers</i> , 112 Ill. 263.....	148
<i>Terre Haute and Indianapolis R. R. Co. v. Voelker</i> , 129 Ill. 542.....	327
<i>Thayer v. Peck</i> , 93 Ill. 357.....	216
<i>Thomas v. Fischer</i> , 71 Ill. 576.....	535
<i>Thomas ads. Miller</i> , 14 Ill. 430.....	21
<i>Thompson ads. Ennor</i> , 46 Ill. 220.....	21
<i>Toledo, Peoria and Warsaw Ry. Co. v. Curtinius</i> , 65 Ill. 120.....	474
<i>Tolman v. Jones</i> , 114 Ill. 147.....	426
<i>Tolono, Village of, ads. Craw</i> , 96 Ill. 256.....	86
<i>Tompkins ads. Scofield</i> , 95 Ill. 190.....	351
<i>Trumbo v. The People</i> , 75 Ill. 564.....	197
<i>Trumbull ads. Union Trust Co.</i> 137 Ill. 146.....	228
<i>Trustees ads. Board of Education</i> , 63 Ill. 204.....	151
<i>Trustees of Schools ads. Miller</i> , 88 Ill. 26.....	140
<i>Trustees of Schools v. Shepherd</i> , 139 Ill. 114.....	139
<i>Tunesma v. Schuttler</i> , 114 Ill. 164.....	436

## U

<i>Union Mutual Life Ins. Co. v. White</i> , 106 Ill. 67.....	242
<i>Union Nat. Bank ads. Myers</i> , 128 Ill. 478.....	361
<i>Union Rolling Mill Co. v. Gillen</i> , 100 Ill. 52.....	537
<i>Union Trust Co. v. Trumbull</i> , 137 Ill. 146.....	228

## V

## PAGE.

VanBuskirk v. Day, 32 Ill. 260.....	440
VanOlinder <i>ads.</i> Carpenter, 127 Ill. 42.....	121
Velie <i>ads.</i> Joliet, Aurora and Northern Ry. Co. 140 Ill. 59.....	144, 397
Vincent v. Chicago and Alton R. R. Co. 49 Ill. 35.....	209
Virginia, City of, <i>ads.</i> Murray, 91 Ill. 558.....	197
Voelker <i>ads.</i> Terre Haute and Indianapolis R. R. Co. 129 Ill. 452...	327
Voris v. Renshaw, 49 Ill. 425.....	152

## W

Wabash, St. Louis and Pacific Ry. Co. v. Johnson, 108 Ill. 11.....	544
Wabash, St. Louis and Pacific Ry. Co. v. McDougall, 126 Ill. 111....	379
Wahle v. Reinbach, 76 Ill. 332.....	279
Walker <i>ads.</i> Rivard, 39 Ill. 413.....	49
Walker v. Walker, 42 Ill. 311.....	47
Wallahan v. The People, 40 Ill. 102.....	610
Walsh <i>ads.</i> The People, 96 Ill. 232.....	528
Walsh <i>ads.</i> Schroeder, 120 Ill. 403.....	56
Walters v. Town of Lake, 129 Ill. 23.....	531
Walton v. Develing, 61 Ill. 206.....	426
Warren v. First Nat. Bank, 149 Ill. 9.....	295
Wash <i>ads.</i> Bryan, 2 Gilm. 557.....	47
Washington Ice Co. v. City of Chicago, 147 Ill. 327.....	381, 573
Washington Ice Co. <i>ads.</i> Hyde Park, 117 Ill. 236.....	572
Watson <i>ads.</i> Hitchcock, 18 Ill. 289.....	216, 222
Waugh <i>ads.</i> Carr, 28 Ill. 418.....	164
Webb <i>ads.</i> Beeler, 113 Ill. 436.....	397
Weber v. Christen, 121 Ill. 91.....	49
Weber v. Mick, 131 Ill. 533.....	55
Webster v. Steele, 75 Ill. 545.....	164
Weiller <i>ads.</i> Abrahams, 87 Ill. 179.....	137
Welch <i>ads.</i> Illinois Central R. R. Co. 52 Ill. 183.....	397
Weldon <i>ads.</i> Illinois Central R. R. Co. 52 Ill. 290.....	555
Welsch v. Belleville Savings Bank, 94 Ill. 191.....	215
West Chicago Park Comrs. v. McMullen, 134 Ill. 170.....	524
Westchester Fire Ins. Co. v. Foster, 90 Ill. 121.....	251
Western Union Ry. Co. <i>ads.</i> Emerson, 75 Ill. 176.....	372
Weston <i>ads.</i> City of Joliet, 123 Ill. 641.....	397
Weston <i>ads.</i> Race, 86 Ill. 92.....	440
Wiggins v. Lusk, 12 Ill. 132.....	49
Wiggins Ferry Co. <i>ads.</i> St. Louis Nat. Stock Yards, 112 Ill. 384.....	281
Wightman v. Wightman, 45 Ill. 167.....	426
Wilbur v. City of Springfield, 123 Ill. 395.....	84, 199
Wilcox <i>ads.</i> Chicago City Ry. Co. 138 Ill. 370.....	533
Wiley <i>ads.</i> Booth, 102 Ill. 84.....	217
Willenborg <i>ads.</i> Illinois Central R. R. Co. 117 Ill. 203.....	597



## PAGE.

Williamson <i>ads.</i> The People, 13 Ill. 661.....	196
Wilson v. Board of Trustees, 133 Ill. 443.....	27, 370
Wilson <i>ads.</i> Chicago, Milwaukee and St. Paul Ry. Co. 133 Ill. 60....	327
Wilson v. Haecker, 85 Ill. 352.....	440
Wolf <i>ads.</i> Oswald, 129 Ill. 200.....	278
Wolfer v. Hemmer, 144 Ill. 554.....	121
Woodward v. Seely, 11 Ill. 157.....	281
Working <i>ads.</i> Alphin, 132 Ill. 484.....	361
Whipple <i>ads.</i> Chicago and Rock Island R. R. Co. 22 Ill. 105.....	139, 203
Whitcomb <i>ads.</i> The People, 55 Ill. 176.....	197
White <i>ads.</i> The People, 94 Ill. 607.....	86
White <i>ads.</i> Union Mutual Life Ins. Co. 106 Ill. 67.....	242
Wright v. Griffey, 147 Ill. 496.....	574
Wright <i>ads.</i> The People, 70 Ill. 388.....	95
Wulff v. Aldrich, 124 Ill. 592.....	198

## Y

Yates v. Shaw, 24 Ill. 367.....	578
Young <i>ads.</i> Clapp, 147 Ill. 176.....	56

## Z

Zearing v. Raber, 74 Ill. 413.....	309
Zehr <i>ads.</i> Pearson, 125 Ill. 573.....	197

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